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Supreme Court, U.S.
FILED

No. 94 1515 MAR 14 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, DEBTOR

MARTIN ROCHMAN, EDWARD KAUFMAN, and
ROBERT C. RICHARDS
Petitioners
v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
and
THE OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should persons be barred from commencing an action under the securities laws and/or the common law against proponents of a confirmed and implemented plan of reorganization alleging that such proponents misrepresented material matters of fact in their disclosure statement simply because such persons participated in the confirmation process, even though they were not able to fully litigate some of their allegations during that process because their appeal of the confirmation order was dismissed as moot, without their fault, and were not able to litigate their other allegations because they did not discover the basis for them until after the confirmation order had been issued?

PARTIES BELOW

Petitioners Martin Rochman, Edward Kaufman and Robert C. Richards ("RKR") were common stockholders of Public Service Company of New Hampshire and were the appellants below and the defendants in the adversary proceeding before the bankruptcy court from which this appeal arose.

Respondents are the Public Service Company of New Hampshire ("PSNH") and the Official Committee of Equity Security Holders for Public Service Company of New Hampshire. They were the plaintiffs in the adversary proceeding before the Bankruptcy Court. The State of New Hampshire (the "State") intervened as a plaintiff in the adversary proceeding and is an intervenor in this appeal.

However, the real parties in interest on the Respondents' side are Northeast Utilities ("NU"), the parent of Public Service Company of New Hampshire, and the Equity Committee. RKR has never threatened to sue, or expressed any interest in suing PSNH or reorganized PSNH or any of its officers and directors.

Also, although RKR originally considered suing the State for aiding and abetting NU's efforts to take over PSNH, and benefitting from that effort, the State contended and the bankruptcy court held that RKR were barred from suing the State by the Eleventh Amendment. RKR did not appeal that determination. Consequently, the State no longer has any financial stake in this matter.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE REQUESTED WRIT	44
CONCLUSION	61
APPENDICES	1a

TABLE OF AUTHORITIES

CASES:

Appeal of Conservation Law Foundation,
127 N.H. 606 (1986) 17, 20

Appeal of Richards,
134 N.H. 148, 590 A.2d 586 (1991),
cert. denied 112 S.Ct. 275 (1991) . . 36

Federal Power Comm'n v. Hope Natural Gas Company,
320 U.S. 591, 64 S. Ct. 281 (1944) . 18

Gelpi v. Tugwell,
123 F.2d 377 (1st. Cir. 1941) 7

In re Michelson,
141 B.R. 715 (Bankr. E.D.Cal. 1992) . 48

In re PSNH,
114 B.R. 820 (Bankr. D.N.H.) 32

In re Public Serv. Co., No. 90-272-D,
slip. op. (D.N.H. Aug. 21, 1991) . . 37

In re Public Service Company of New Hampshire, 963 F.2d 469 (1st Cir. 1992)
cert. denied, 113 S.Ct. 304 (1992) 8, 37

In re Public Service Company of New Hampshire,
148 B.R. 702 (Bankr. D.N.H. 1992) . . 2

In re Public Service Company of New Hampshire,
848 F. Supp. 318 (D.R.I., 1994) . . . 2

Matter of Newport Harbor Associates,
589 F.2d 20 (1st Cir. 1978) 43

Northeast Utilities Service Co. v. FERC, et al., 993 F.2d 937 (1st Cir. 1993) 28

U.S.Bancorp Mortgage Company v. Bonner Mall Partnership,
__ U.S.__, 115 S.Ct. 386 (1994) . . 59

Virginia Bankshares Inc. v. Sandberg
111 S.Ct. 2749 (1991) 22

Yell Forestry Products, Inc. v. First State Bank,
853 F.2d 582 (8th Cir. 1988) . . 51, 53

ADMINISTRATIVE DECISIONS:

Northeast Utilities Service Company
53 FERC ¶ 63,020 (1990) 28

Re Pub. Serv. Co. of N.H.,
70 NH PUC 164, 66 PUR 4th 349 (1985) 21

STATUTES:

11 U.S.C. § 1125(e) . . . . *passim*

11 U.S.C. § 1144 . . . . . . 8, 11, 47

28 U.S.C. § 1334(b) 4

COURT RULES:

Fed. R. Bankr. P. 8013 . . . . . 56, 57

OTHER:

Restatement (Second) of Judgments, §28 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Martin Rochman, Edward Kaufman and Robert C. Richards, ("RKR") respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the First Circuit affirming a judgement of the United States District Court for the District of New Hampshire (the "District Court") which had affirmed an injunction issued by the United States Bankruptcy Court for the District of New Hampshire barring RKR from commencing an action under the securities laws and the common law against certain proponents of the confirmed plan of reorganization for the Public Service Company of New Hampshire.

OPINIONS BELOW

The opinion of the First Circuit appears in Appendix A to this petition.

The opinion of Ernest C. Torres of the District Court for the District of Rhode Island, sitting by designation for the District of New Hampshire, reported as In re Public Service Company of New Hampshire, 848 F. Supp. 318 (D.R.I., 1994), appears in Appendix B.

The opinion issued by the Bankruptcy Court, reported as In re Public Service Company of New Hampshire, 148 B.R. 702

(Bankr. D.N.H. 1992), appears in Appendix C.

JURISDICTION

The First Circuit entered judgment on January 6, 1995. A timely petition for rehearing was filed and the First Circuit's denial of the petition for rehearing was issued on January 26, 1995 and appears in Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

This case concerns the scope of the "safe harbor" provision of the bankruptcy code, 11 U.S.C. § 1125(e), which states:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the

> debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

STATEMENT OF THE CASE

This petition arises out of an adversary proceeding commenced by the Respondents filing a complaint in the Bankruptcy Court for the District of New Hampshire (the "Bankruptcy Court"). That court held, over RKR's objection, that it had jurisdiction under 28 U.S.C. § 1334(b). App. C at 71a. RKR did not appeal that determination.

The Respondents by their complaint asked the Bankruptcy Court to declare that RKR were barred by Section 1125(e) of the bankruptcy code (the"Code") and principles of res judicata, and to enjoin RKR, from commencing an action in the Southern District of New York against

Northeast Utilities ("NU") and the Equity Committee and their attorneys and financial advisors, proponents of the confirmed plan of reorganization for PSNH (the "Plan"), and against the State of New Hampshire (the "State"), a major beneficiary of the Plan.

RKR would alleged in their action that the proponents conspired with each other and with the State to intentionally misrepresent material matters of fact in the disclosure statement they issued with regard to the Plan (the "Disclosure Statement") and to fool the Bankruptcy Court into approving that statement in order to procure acceptance of the Plan and subsequent confirmation. RKR would further allege that as a result of such fraud, RKR and the other former common stockholders of PSNH suffered substantial damages, because if the Plan had not been accepted, it would not have been confirmed, and PSNH would have then sought and achieved much greater value for the impaired interests in a rate case before the New Hampshire Public Utilities Commission ("NHPUC").

In response to the Respondents complaint, RKR argued that their proposed action was not barred by Section 1125(e) because that section provides a "safe haven" only for those proponents who comply with Title 11 in good faith and RKR would allege and prove that the proponents intentionally misrepresented material matters of fact and therefore they acted in bad faith.

RKR argued that their action was not barred by res judicata because it was a cause of action different from the confirmation proceeding and an action clearly contemplated by Section 1125(e) as an action to be brought, and that logically could be brought, only after a reorganization plan has been confirmed and implemented, and only in a federal district court. RKR pointed out that they were not seeking to disturb the confirmation order or the reorganized debtor or seeking to recover damages from anyone that had invested in reorganized PSNH in good faith reliance on the confirmation order but only from those proponents of the Plan who by their fraud had caused it all to happen and therefore their action could not properly be considered a collateral attack on the confirmation order or indeed anything that the bankruptcy court need be at all concerned about.

RKR also argued, relying on Restatement (Second) of Judgments, §28 and Gelpi v. Tugwell, 123 F.2d 377 (1st. Cir. 1941), that their action was not barred by collateral estoppel in so far as it concerned the allegations they litigated during the confirmation process, because their appeal of the confirmation order was dismissed as moot, without their fault, by the First Circuit (In re Public Service Company of New Hampshire, 963 F.2d 469 (1st Cir. 1992) cert. denied, 113 S. Ct. 304 (1992).

And RKR argued collateral estoppel did not bar their action in so far as it concerned their other allegations because they did not discover the basis for those allegations until several months after the confirmation order had been issued and some time after the statute of limitations for filing a request to revoke under Section 1144 of the Code had expired and therefore they were not able to litigate those allegations at all during the process.

The Bankruptcy Court held that RKR's action was barred in so far as it concerned the allegations they did litigate by res judicata since although their appeal was dismissed as moot, it was dismissed not as a matter of law but because RKR failed to get a stay. It considered as immaterial the fact that RKR had asked it as well as the District Court for a stay and those requests had been denied. App. C at 93a.

And it held that RKR were barred with regard to the allegations that they had not litigated because those allegations concerned topics that were discussed in the Disclosure Statement, and therefore were not "secret frauds" and RKR as participants in the process had an obligation to discover and litigate during the process any misrepresentations made with regard to any such topics. App. C. at 123a.

RKR appealed to the District Court of New Hampshire. Judge Ernest Torres of the District Court of Rhode Island, sitting by designation affirmed. He held that RKR's action was barred in so far as it concerned allegations that they had litigated by collateral estoppel because RKR had failed to pursue a stay with sufficient diligence and therefore were "at fault" for their failure to get a decision on the merits of their appeal (App. B. at 52a). The court thus held that the proponents were entitled not only to the benefit of the denial of RKR's request for a stay but also to the benefit of an assumption that that RKR could have gotten a stay if they had only made a greater effort to get one.

He also held that RKR were barred from commencing their action with regard to their other allegations, because he held, albeit without a hearing and without RKR even knowing that it was a consideration, that RKR were aware of the basis for those allegations before the time for filing a request to revoke under

Section 1144 had expired but had failed to file a timely request. App. B at 44a.

RKR then appealed to the First Circuit. The First Circuit held that RKR were barred from prosecuting their action, not by the literal language of Section 1125(e), or by res judicata or collateral estoppel as those doctrines may be applied to other federal proceedings, but simply because RKR participated in the confirmation hearings before the bankruptcy court as opponents of the Plan and litigated or could have litigated all of their contentions during those hearings, regardless of whether they were prevented from fully litigating the allegations they did litigate and regardless of whether they actually discovered the basis for their other allegations during those hearings.

The First Circuit says that its rule

is necessary in order "to make Congress's plan work" because suits such as RKR's would have a chilling effect on the process. "The willingness", it says, "of future claimants and creditors to compromise in chapter 11 proceedings depends on giving the reorganization court's approval a due measure of finality." App. A at 21a. And it says its restriction is "narrow" in that it would permit suits that concern "secret frauds" but necessary to bar suits like RKR's with regard to other misrepresentations of fact that proponents manage to slip into disclosure statements and by bankruptcy court judges.

RKR filed a petition for rehearing. They pointed out to the First Circuit that it had apparently misunderstood what RKR's complaint was about because it certainly had misdescribed RKR's complaint in many material respects and that when properly understood, their complaint was clearly serious and well founded. RKR asked the court to grant rehearing in order that it might write an opinion that accurately described the facts of RKR's appeal. RKR argued that they were surely entitled to have the facts of their case described accurately so that the court would be deciding their case and not some other case, but to no avail.

Since the First Circuit did not accurately describe RKR's complaint or discuss in any detail RKR's participation in the confirmation process, it is necessary to point out here where the First Circuit went wrong so that this Court can have a clear understanding of the facts.

The First Circuit says at the outset of its opinion, that RKR has been enjoined from suing PSNH, among others (App. A at 2a), but as noted above, RKR never intended to sue PSNH or reorganized

PSNH or any of its officers and directors, because none of them were responsible for the Plan or the preparation of the Disclosure Statement, and therefore RKR never intended their suit to be, and do not believe it should be considered to be, a collateral attack on the confirmation order or the reorganized debtor.

The First Circuit then goes on to discuss RKR's complaint and correctly points out that it concerns essentially two separate topics: (1) the power of NHPUC over PSNH's rates, and (2) the value of the second step of the Plan, the merger with NU, but the First Circuit grossly misdescribes RKR's allegations with regard to both of those topics.

It says, with regard to the first topic, that the Disclosure Statement contained some general statements about the power of the NHPUC to refuse to allow PSNH to recover its imprudent investment in Seabrook and to temper any rate request with a phase-in. App. at 12a. It thereby suggests that RKR are complaining because the Disclosure Statement asserted that the NHPUC could deny PSNH the right to recover its full investment in Seabrook in the traditional manner, i.e on a straight line basis, an assertion, it says, "few utility lawyers would be greatly disturbed" about. App. at 14a.

But in fact, RKR are complaining because the Disclosure Statement represented that the NHPUC had been "accorded" essentially unfettered discretion to set rates regardless of the impact on PSNH's ability to recover even its prudent investment.[1]

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[1] The offending language is the following:

"B. MAJOR ISSUES PRESENTED BY SEABROOK RATE CASE

The extent to which the investment in Seabrook would be reflected in PSNH's rates following a Seabrook rate case would depend on the NHPUC's findings on three issues: prudence of the Seabrook investment, the

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extent to which the investment in the facility is "used and useful", and avoidance of "rate shock".

1. Prudence.

Under New Hampshire law, only that portion of an investment that is "prudently incurred" may be reflected in rates. An investment is "imprudent", and excluded from rates, to the extent that (i) it was "forseeably wasteful" based on information available to the utility at the time the investment was made or (ii) the cost is excessive due to imprudent construction management. The factual analysis associated with prudence determination is lengthy and complex, and the facts are subject to a variety of conclusions.

2. Used and Useful.

Investment in a facility may be recovered in rates only to the extent that the facility is "used and useful" to the utility franchise-in other words, that the facility is necessary and economic in meeting PSNH's requirements to provide adequate electric service to New Hampshire customers. The NHPUC has been accorded wide flexibility to apply this principle as a means of sharing the excess capacity burden between investors and customers. In a Seabrook rate case, the NHPUC would be asked to determine what could reasonably be done with the Seabrook investment as of the time the "used and useful" determination. Among other considerations, at issue could be whether and how long any portion of Seabrook power or capacity would be excess to the needs of PSNH's retail customers.

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3. Affordability of Rates.

The NHPUC is given wide latitude to establish "just and reasonable" rates. As the New Hampshire Supreme Court has said, "[t]he traditional ratemaking process gives the commission flexibility to accommodate the legitimate interests of both customers and investors in responding to the extraordinary issues disclosed by [PSNH's Seabrook investment]." *Appeal of Conservation Law Foundation*, 127 N.H. 606, 648 (1986). "There is substantial economic leverage to establish a rate level that will not be oppressive to consumers or the New Hampshire economy or which is unfair to stockholders." *Id.* at 644., quoting the NHPUC, *Re Pub. Serv. of N.H.*, 66 PUR 4th 349, 423 (1985).

If a rate increase or series of increases is too high or comes too quickly, it might adversely affect the New Hampshire economy or adversely affect PSNH's markets for electricity by depressing demand or driving customers from the system, a phenomenon commonly referred to as "rate shock". It is likely that the NHPUC would not permit inclusion in rates of PSNH's entire Seabrook investment at one time, since to do so might require rate increases which would be too high or come too quickly. Accordingly, PSNH would likely propose a rate moderation plan incorporating either or both of two ameliorative concepts:(i) one which would recognize a recovery of less than PSNH's full $2.9 billion investment or (ii) a gradual increase in rates over a number of years, based on the rate increase "phase-in" concept included in the Rate Plan."

RKR claims that that representation is false and that the proponents surely knew it was false when they made it.

This Court has held in a long line of cases at least since Federal Power Comm'n v. Hope Natural Gas Company, 320 U.S. 591, 64 S. Ct. 281 (1944) that investments in, and by, utilities are protected by the Constitution. But if, as the Disclosure Statement suggests, a state has the power to deny a utility the right to recover its prudent investment in its operating facilities even after it has promised by law and commission decision that the utility is entitled to recover such investments and the utility has invested billions of dollars in reliance on that promise, one would have to conclude that Hope and its progeny are only so much smoke designed by this Court to fool unsuspecting Americans into investing their hard earned savings in the utilities for returns that don't come close to compensating them for the risks they are being induced to run.

One might believe, as NU pretends to believe, that this Court, if and when asked, would declare that a state has such power and thereby acknowledge that it has, in effect, been blowing smoke in the eyes of investors for more than 50 years, but RKR does not believe that this Court would ever do that. Indeed, RKR got involved in this proceeding because they believed in this Court and believed that in the end it would hold the State to its promises.

More importantly, it is clear that this Court had not as of the date of the Disclosure Statement and still has not declared that New Hampshire or any other state has such power and therefore the Disclosure Statement clearly misrepresented a material matter of fact when it said that the NHPUC had already been "accorded" such power.

To support its assertions, the Disclosure Statement quoted the Supreme Court of New Hampshire in Appeal of Conservation Law Foundation, 127 N.H. 606 (1986) but the language quoted was mere dicta and from a court that the proponents knew did not itself have the power to "accord" the NHPUC with such power. And because the language was mere dicta and that court then upheld the approval by the NHPUC of a financing needed to complete Seabrook, PSNH did not appeal either the holding or the dicta to this Court.

The Disclosure Statement also quoted the NHPUC to give the impression that the NHPUC was then of the view that it had such power. But that quote was a deliberate misquote. What the NHPUC really said was the following:

> "There is substantial economic leverage to establish a rate level that will not be oppressive to consumers or the New Hampshire economy or which is unfair to stockholders in the event of disallowance of any portion of the capital investment on the basis of imprudence." [emphasis added]

Re Pub. Serv. Co. of N.H., 70 NH PUC 164, 246, 66 PUR 4th 349, 423 (1985).

Clearly, as of 1985, when Seabrook was nearly completed, both the NHPUC and PSNH believed that PSNH had the right to recover its prudent investments.

The Bankruptcy Court approved the Disclosure Statement and it presumably believed that it was accurate with regard to the powers of the NHPUC but the Bankruptcy Court had a fundamental misconception of the regulatory process.

It said repeatedly during the course of the proceeding that it understood rate regulation to be a circular exercise in that the value of a utility and its assets is determined by the rates the regulators allow it to charge. App. C at 108a.

But ratemaking has not been so irrational since Hope and it is not circular precisely because utilities have the right to recover their prudent investments in their operating plants. And although the proponents surely realized that the Bankruptcy Court misunderstood the regulatory process, they made no effort to disabuse it of its misunderstanding. Indeed, they purposely and intentionally exploited it to achieve their objectives.

In sum, the Disclosure Statement represented as true what the proponents could not have possibly believed was true and as this Court has held, a representation that one holds a certain opinion or belief when in fact one does not hold that belief is actionable. Virginia

Bankshares Inc. v. Sandberg, 111 S.Ct. 2749 (1991).

The First Circuit also grossly misdescribes RKR's Complaint with regard to the second topic, the value of the merger.

The First Circuit says that RKR are complaining simply because the Disclosure Statement represented that the value of the Plan with the merger was only slightly higher than without the merger while the regulatory agencies subsequently determined that PSNH might collapse without the merger.

But RKR are in fact complaining because the proponents represented in the Disclosure Statement that the value of the merger was small and then after the confirmation order had been issued submitted evidence to prove, and did prove to the satisfaction of the Federal Energy Regulatory Commission ("FERC"), that the value of the merger was enormous.

The Disclosure Statement contained the Equity Committee's estimates of what the Plan would achieve under the different scenarios.[2]

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[2] The Disclosure Statement said the following with regard to what the Plan would achieve for the preferred stockholders:

> "The following table sets forth the Equity Committee's estimate of the range of values of the distribution under the Plan to holders of Allowed Claims and Interest in Class 11 [Preferred Stock] in several different scenarios. In each scenario, the "best case" is one in which the Petition Date Amount Allowed Claims in Classes 10 and 10A total $847,400,000 and the book value adjustment is a positive $10,000,000 and the "worst case" is one which the Petition Date Amount of Allowed Claims in Classes 10 and 10A total $900,000,000 and the book value adjustment is a negative $10,000,000.

	Total Estimated Value (a)	Percent of Total Par Value (b)	Percent of Total Claims (c)
Seabrook Operating and Merger Occurs (d)			
best case	$337.0	104.9%	69.7%
worst case	$325.2	101.2%	67.3%

Seabrook Operating and No merger Occurs (d)			
best case	$326.1	101.5%	67.5%
worst case	$314.3	97.8%	65.0%

* * *

> (a) Assumes value of Reorganized PSNH Common Stock is $20.00 per share, value of Contingent Notes is 122% of face(principal) amount, and value of each NU Warrant is $2.00.
>
> (b) Total par value of outstanding Preferred Stock is $321.4 million.
>
> (c) Total Preferred Stock claims are $483.3 million, including par value of $321.4 million and pre-Petition Date accrued and unpaid dividends of $161.9 million.
>
> (d) Assumes issuance of maximum potential principal amount of Series C Contingent Notes."

The Disclosure Statement also represented the following with regard to the value the Plan would achieve for the common stockholders:

> "The following table sets forth the Equity Committee's estimates of the range of values of the distribution under the Plan to holders of Allowed Claims and Interests in Class 12 [Common Stock] in several different scenarios. In each scenario, the "best case" is one in which the Petition Date Amount Allowed Claims in Classes 10 and 10A total $847,400,000 and

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the book value adjustment is a positive $10,000,000 and the "worst case" is one which the Petition Date Amount of Allowed Claims in Classes 10 and 10A total $900,000,000 and the book value adjustment is a negative $10,000,000.

	Total Estimated Value (a)	Estimated Value Per Share(b)
Seabrook Operating and Merger Occurs (c)		
best case	$163.5	$3.88
worst case	$112.7	$2.67
Seabrook Operating and No merger Occurs (c)		
best case	$157.6	$3.74
worst case	$106.8	$2.53

* * *

(a) Assumes value of Reorganized PSNH Common Stock is $20.00 per share, value of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is $2.00.

(b) Based on 42,154,548 shares of Existing PSNH Common Stock outstanding.

(c) Assumes issuance of maximum potential principal amount of Series C Contingent Notes."

The Disclosure Statement also contained financial projections consistent with those estimates representing that the assets of Reorganized PSNH would be worth approximately $2.3 billion, if Seabrook operated, whether the merger was implemented or not.

It also failed to say anything about the value of the merger to others and by representing that the merger was worth little to the impaired classes, it implied that it was of little value to anyone else.

However, after the confirmation order had been issued, the proponents, along with the State, submitted sworn testimony to FERC to prove and did prove

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to the satisfaction of FERC that if the merger did not occur, reorganized PSNH would be worth substantially less and the impaired classes would receive substantially less than was represented in the Disclosure Statement.[3] And FERC also determined, based on the proponents testimony that the merger synergies would be worth more than $1 billion to all concerned. Northeast Utilities Service Company 53 FERC ¶ 63,020 at 65,210-13 (1990).

Thus the Disclosure Statement falsely represented the value the proponents expected the merger would bring to the Plan.

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[3] The FERC orders were appealed to the First Circuit, which noted in its opinion that the impaired interests stood to lose $250 million in the absence of the merger. Northeast Utilities Service Co. v. FERC, et al., 993 F. 2d 937, 946 (1st Cir. 1993).

Richards and Rochman[4] became active in the proceeding in late December of 1989, after they had read the final draft of the disclosure statement and realized from that draft that the proponents were trying to fool the bankruptcy court into confirming a plan that was inconsistent with PSNH's rights under the law and the Constitution. By then the Plan had been fully negotiated and the hearings on the Disclosure Statement had been tentatively closed, subject to being reopened after the New Hampshire legislature passed some necessary enabling legislation.

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[4] Rochman had been appointed to the Equity Committee in November, 1989, after the Plan had been negotiated, replacing Donald Smith and Richard Greenberg, who had submitted their resignations, as the only member of the committee that held only or mostly common stock. As soon as he became a member he realized that the Equity Committee had not adequately represented the common stockholders and asked the Trustee to create a common stockholder committee. His request of course was denied.

Richards had been introduced by Mr. Smith to Rochman in early December, 1989. Kaufman joined Richards and Rochman in January of 1990.

On December 20, 1989, Richards and Rochman filed a document containing several different motions and claimed therein, inter alia, that the draft of the disclosure statement misrepresented the powers of the NHPUC. And they appeared for the first time in the proceedings at the last hearing on the Disclosure Statement on December 28, 1989, and reiterated their contentions but the court at the urging of the proponents, rejected all of them.

The Disclosure Statement was approved on January 3, 1990. RKR did not appeal that approval because they understood that that approval was merely an interlocutory order and that the proponents would have to prove at the confirmation hearings that they had provided adequate disclosure.

RKR filed detailed objections to the

Plan claiming again that the Disclosure Statement had misrepresented the powers of the NHPUC. RKR also claimed that because PSNH had the right under New Hampshire law to recover its prudent investment in Seabrook once it went on line, provided only that it had the economic power to do so, and because all the audits done on Seabrook concluded that PSNH's prudent investment in that plant was much greater than would be recovered by the Plan, the proponents could not possibly prove and the Bankruptcy Court could not possibly determine that the Rate Agreement was a reasonable compromise of a Seabrook rate case and therefore could not confirm the Plan.

On April 20, 1990, after six days of hearings, the court rejected RKR's objections and issued the Confirmation Order. On May 17, 1990, by a separate opinion, it specifically rejected all of RKR's objections. In re Public Serv. of N.H., 114 B.R. 820 (Bankr. D.N.H. 1990).

It held that the NHPUC did have the broad power to set rates as described in the Disclosure Statement and that, therefore, the Rate Agreement was a reasonable compromise of what could be expected from a rate case.

It also held that the proponents had engaged in post-petition disclosure and solicitation in compliance with Section 1125 of the Code and rejected all the reasons RKR had advanced in their objections for a finding to the contrary.

It also said that the proponents had solicited acceptance in good faith but since the court did not have to make such a determination to confirm the Plan and since the court had determined that the Disclosure Statement accurately described the powers of the NHPUC and would presumably have rejected the Plan if it had determined otherwise, the issue of whether the proponents had solicited acceptance in good faith was not even reached, much less litigated, and therefore the court's pronouncements on that issue can be considered nothing but superfluous dicta.

RKR appealed the Confirmation Order to the District Court of New Hampshire claiming that the Bankruptcy Court's determination as to the powers of the NHPUC was wrong as a matter of law.

Also, although the First Circuit suggests otherwise (App. A at 23a), RKR did seek a stay of the confirmation order, first from the Bankruptcy Court and then from the District Court.

RKR did not in fact believe they needed a stay. They did not believe they would be irreparably damaged if the Plan were implemented because they believed that if their appeal was successful, the

Plan could be modified, even if by then fully implemented, to grant them and the other common stockholders as well as the other impaired interests, effective relief without injuring anyone, not even NU, who by then may have invested in PSNH, in reliance on the Confirmation Order.

The Confirmation Order, unlike every other confirmation order, did not just allocate the value of estate to the various claimants but actually determined the value of the estate by fixing the rates PSNH would be allowed to charge. RKR believed that if their appeal was successful, the value of the estate would be increased and the additional value could be easily allocated to the impaired interests by converting the common stock of reorganized PSNH into a preferred stock, junior to all of reorganized PSNH's other securities, and then issuing a new common stock to the impaired interests that were entitled to a share of the additional value.

RKR also did not believe they could get a stay even if it were judged they needed one because they could not possibly put up a bond sufficient to cover the proponents potential damages.

On the other hand they were aware of some of the cases that suggested that if they did not ask for a stay their appeal might be dismissed simply because they did not ask regardless of whether they actually needed or were entitled to a stay. So they asked.

The Bankruptcy Court denied RKR's request for reasons that at least in part were fully expected and unobjectionable, i.e. that the damages would be massive and RKR could not put up a bond sufficient to cover them.

Subsequently, on February 6, 1991,

when it became apparent, from oral argument, that the Supreme Court of New Hampshire would affirm the NHPUC decision approving the Rate Agreement, RKR asked the District Court for a stay and urged therein that the court quickly issue a decision on the merits of RKR's appeal.

The District Court however declined to rule on RKR's request for a stay and their appeal and both were still pending, when, after the Supreme Court of New Hampshire upheld the NHPUC decision (Appeal of Richards, 134 N.H. 148, 590 A.2d 586 (1991), cert. denied 112 S.Ct. 275 (1991)), NUSCO implemented the Plan on May 16, 1991.

NUSCO then moved the District Court to dismiss RKR's appeal as moot. The District Court declined to rule on that motion as well.

Months later, prompted by RKR's filing of a petition for a writ of mandamus with the First Circuit, the District Court finally issued its decision on the merits affirming the Confirmation Order. In re Public Serv. Co., No. 90-272-D, slip. op. (D.N.H. Aug. 21, 1991).

RKR then appealed to the First Court. Upon a motion by NUSCO, the First Circuit dismissed, holding that RKR's appeal was moot since effective and equitable relief was no longer possible. In re Public Service Company of New Hampshire, 963 F. 2d 469 (1st Cir. 1992), cert. denied, 113 S. Ct. 304 (1992).

Thus, RKR, despite their participation in the process, were not able to fully litigate their allegations with regard to the powers of the NHPUC.

And they were not able to litigate their allegations with regard to the value of the merger at all.

The First Circuit says that RKR could have litigated those allegations and as opponents of the Plan they had every incentive to raise them at that time and if they didn't know of them, an obligation to exercise due diligence to discover them.

It is noted however that RKR opposed the Plan because RKR considered the Plan fundamentally unfair to the common stockholders even if it was fully implemented and achieved the maximum value the proponents claimed it could achieve. Consequently, RKR had no real incentive to question the proponents representations as to what they claimed the Plan would achieve under any of the other scenarios. They also did not have the resources to delve into such details prior to the confirmation hearing.[5]

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[5] Early on in the process RKR had asked the Bankruptcy Court to create an official committee for the common stockholders that would have an undivided interest in representing the common stockholders and the expertise and resources necessary to do an adequate job but that

Although RKR recognized that the proponents were misrepresenting the powers of the NHPUC in a rate case and therefore what could be achieved if the Plan were rejected, RKR never imagined that the proponents would misrepresent what their own plan would achieve under any of the scenarios.

Consequently, when the Equity Committee applied on December 28, 1989, to amend the Disclosure Statement to include the language quoted in footnote 2, supra at 24, setting forth their estimates of what the Plan would achieve under the different scenarios and claimed that the information was needed to correct false information contained in an advertisement that Rochman and Richards had run in the Manchester Union Leader on December 19, 1989, Richards and Rochman assumed that

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request was denied.

the proponents were making a special effort to disclose the truth. Only sometime later did RKR discover that they had made a special effort to misrepresent and mislead.

And because RKR did not then know that the proponents had misrepresented the value of the merger, RKR did not allege in their objections to the Plan, or discover during the confirmation proceedings, that the proponents had done so and the Bankruptcy Court was not called upon to determine and did not determine that, despite such misrepresentations, the proponents had solicited acceptance in compliance with the Code.

Sometime after the Confirmation Order had been issued, RKR discovered what the proponents had done.

RKR were not permitted to intervene in the proceedings before the NHPUC and FERC, because NUSCO and the State objected to their intervention, but because RKR had petitioned to intervene, they were served by those agencies with copies of their opinions and orders.

In early January of 1991, RKR read the ALJ's decision recommending approval of the merger and realized what the proponents had done and why they apparently had done it.

The proponents had no doubt recognized that if they disclosed true estimates of the value of the merger, the impaired classes might very well reject the Plan. They could solve that problem by conditioning the Plan on approval of the merger, but they no doubt recognized that if they did that, FERC, because of the opposition from the rest of New England, and perhaps from some disgruntled members of the impaired classes, might reject the Plan.

So they structured the Plan in two

steps, first the reorganization and then the merger, in order to be able to present FERC with a deal FERC could not reject without damaging the creditors and stockholders of PSNH and then they misrepresented the value of the merger in the Disclosure Statement in order to persuade the impaired interests to accept their two-step plan.

On January 17, 1991, RKR, after they understood what the proponents had done, requested the Bankruptcy Court to revoke the Confirmation Order. RKR recognized that the request was barred by the literal language of Section 1144, but argued that since the Plan had still not been implemented, the Bankruptcy Court had the inherent power to protect the process from fraud.

The court denied RKR's request, holding that it had no such power. RKR did not appeal that determination, believing as suggested by the First Circuit in Matter of Newport Harbor Associates, 589 F.2d 20 (1st Cir. 1978), that they could bring an action for damages under the securities law or the common law if and when the Plan was implemented.

On February 4, 1992, the First Circuit heard oral argument on RKR's appeal of the confirmation order and made it apparent that it would declare that the appeal was moot and dismiss it.

Shortly thereafter, RKR informed counsel for NU and the Equity Committee that they intended to file their fraud action.

Although NU and the Equity Committee have contended that RKR threatened their action simply to harass them, RKR were in fact motivated by their firm conviction that the proponents had managed to achieve their objectives by intentionally fooling the Bankruptcy Court into approving a false disclosure statement and RKR were determined to prevent them from benefiting from their actions at the expense of the common stockholders if at all possible.

REASONS FOR GRANTING THE REQUESTED WRIT

RKR respectfully submits that the Court should grant the requested writ because the First Circuit has decided an important question of federal law that has not been, but should be settled by this Court.

The First Circuit held that RKR are barred from prosecuting their fraud action, not by the literal language of Section 1125(e) nor by res judicata or collateral estoppel but simply because RKR participated in the confirmation process as opponents of the Plan. By so holding, the First Circuit has for all practical purposes extended a "safe harbor" to all proponents that solicit acceptances in compliance with Title 11 regardless of whether they do so in good faith, and therefore even to proponents who intentionally fool the bankruptcy courts into approving false disclosure statements because it is very unlikely that any one will ever be able to hold them personally liable for such frauds.

If a participant in the process is able to persuade the bankruptcy court that a disclosure statement contains misrepresentations of material fact, the bankruptcy court will presumably require a resolicitation of acceptances, regardless of whether the court thinks the proponents acted in good faith, and will thereby protect the estate from being damaged and protect the proponents from any personal liability.

On the other hand if a participant such as RKR is unable to persuade the bankruptcy court that the disclosure statement contains material misrepresentations of fact or does not discover the misrepresentations despite his participation until after the confirmation order is issued, it is extremely unlikely that he will be able to do anything about it.

If, like RKR with regard to the powers of the NHPUC, he is unable to persuade the court that the disclosure statement contains material misrepresentations and the court confirms the plan, he probably will not be able to get judicial review of the court's determination because he probably will not be able to get a stay and his appeal will be dismissed as moot.

And if, like RKR with regard to the value of the merger, a participant does not discover the misrepresentations until after the confirmation order is issued he will have no remedy whatsoever.

If he discovers the misrepresentation within 180 days, he might be able to ask the court to revoke the confirmation order pursuant to Section 1144 but probably not. If he is barred from bringing an action under the securities laws because arguably he could have discovered such misrepresentations during the confirmation hearing, if he had only exercised "due diligence", it would seem that he should also be barred from making a request to revoke for the same reason.

The First Circuit's decision holds open the possibility that proponents could be held liable under the securities laws for what it calls "secret frauds" but since an opponent could, arguably, discover any misrepresentation of material fact, by asking the proponents the right questions, the First Circuit's rule would seem to bar all actions with regard to all material misrepresentations.

Also, the Bankruptcy Court, which first conceived of the notion, considered a "secret fraud" as a failure by the proponents to address a topic in any manner so that the bankruptcy court could not make an informed judgment as to what would constitute adequate disclosure with regard to that topic. App. C at 130a. The Bankruptcy Court's notion of a "secret fraud" would thus bar all actions with regard to material misrepresentations, whether reasonably discoverable or not, and only permit them with regard to material omissions. And the Bankruptcy Court by referring to In re Michelson, 141 B.R. 715 (Bankr. E.D.Cal. 1992) seems to be of the view that a right to revoke would also exist only with regard to "secret fraud".

In sum, it would seem that a participant could not possibly hold a proponent personally liable for a disclosure statement that contained material misrepresentations of fact. And of course a non-participant is not likely to discover either during of after the confirmation process, any such misrepresentations, especially any misrepresentations with regard to possible alternatives to the plan.

The First Circuit claims that if Congress's plan is going to work, participants like RKR must be obliged to exercise due diligence in raising all possible objections to the plan and discover all misrepresentations of fact in the disclosure statement during the confirmation process.

RKR would submit, however, that if Congress's plan is going to work, if creditors and investors are going to have some faith in the process, proponents must have an incentive to exercise at least some degree of diligence to make sure that the disclosure statement fully and accurately discloses whatever information the creditors and stockholders need to make an informed decision. And if participants such as RKR can not prosecute post-confirmation actions under the securities laws, proponents will have no such incentive. In fact, they will have an incentive to do just the opposite, to distort, if not conceal completely, every material fact that they think, if fully and accurately disclosed, would persuade the impaired interests to reject their plan.

The First Circuit says that opponents have an incentive to point out substantial errors in Disclosure Statements and they do but the fact that opponents have an incentive to discover everything objectionable about the plan and the disclosure statement does not mean that the law should impose an obligation on them to discover every such misrepresentation of material fact.

It would arguably be appropriate to impose an obligation on official committees, who are given funds from the debtor to hire financial advisors and attorneys, to exercise due diligence to discover any misrepresentations contained in a disclosure statement offered by the debtor or some other party. And the court in Yell Forestry Products, Inc. v. First State Bank, 853 F. 2d 582 (8th Cir. 1988) surely acted reasonably in imposing that burden on a proponent of a plan.

But that hardly means it is appropriate to impose that burden on individual creditors or stockholders who, like RKR, have limited funds, and who are inspired to participate in the process because they believe a disclosure statement offered by some other person contains material misrepresentations of fact.

The First Circuit, as well as the lower courts, say that actions like RKR's will have a chilling effect on the process. But that surely is not true.

Since RKR will have to prove that the proponents intentionally misrepresented material facts, RKR's action, in theory anyway, could only deter proponents from trying to fool the bankruptcy courts into approving false disclosure statements and it is impossible to understand why the courts should be concerned about suits that "chill" such behavior.

The First Circuit and the lower courts are concerned it seems that if RKR are permitted to prosecute their action there will be a flood of such actions. But there is no good reason to believe that that would occur.

RKR are not asking for permission to pursue a new remedy. RKR's action is clearly suggested by Section 1125(e) and participants in the process have surely been aware of the possibility of such suits ever since Section 1125(e) was adopted but such suits are nevertheless rare. Indeed, they are almost non existent. Other than Yell Forestry Products, Inc. v. First State Bank, 853 F.2d 582 (8th Cir. 1988) there have not been any.

Undoubtedly the main reason for that is that proponents generally exercise sufficient diligence to make reasonably certain that their disclosure statements are accurate. And since that would continue to be true, such suits will continue to be rare, and the few that are brought will surely be well founded. Surely, few persons would try to prosecute such an action against the proponents of a confirmed and implemented plan that they do not believe in good faith is serious and well founded.

The First Circuit suggests that the facts of this case illustrate that its restriction is necessary to bar frivolous suits, but RKR's action correctly understood is serious and is well founded and therefore does not illustrate any such thing.

The First Circuit says that in order to make Congress's plan work, confirmation orders must be given a "due measure of finality." But the doctrines of res judicata and collateral estoppel as applied to other proceedings are designed to give all judgments a "due measure of finality" and there is no good reason to believe that Congress would want to give reorganization proceedings an additional measure of finality by applying some special version of collateral estoppel when doing so would clearly frustrate their intent and desire that people who participate in the process do so in good faith.

Congress did establish an absolute and short statute of limitations with regard to requests to revoke and thereby did give the proceedings some additional measure of finality and the Respondents argued to the Bankruptcy Court that Congress would therefore want that limitation be applied to security actions such as RKR's, but if Congress wanted to apply such a limitation to such actions they could easily have done so.

And instead of assuming that Congress wanted to give the proceedings a greater measure of finality than it in fact gave them, it makes more sense, and is more consonant with justice, to assume that Congress thought it appropriate to establish a short and absolute statute of limitations for requests to revoke that could disrupt the reorganization because it knew that persons that were defrauded by a false disclosure statement could still bring an action under the securities laws, not to challenge the confirmation order or upset the reorganization or recover damages from persons that participated in the process in good faith but to recover damages from the persons who perpetrated the fraud.

Finally, it is noted that RKR's complaint is unusual in that RKR's allegations with regard to the powers of the NHPUC concern issues of law as well as fact.

Normally, an allegation of fraud concerns only issues of fact and a determination made by the bankruptcy court during the confirmation process with regard to any issue of fact can be set aside only if "clearly erroneous." Fed. R. Bankr. P. 8013. Consequently, it would be rare that a participant would appeal such a determination and even rarer that he would appeal it beyond the district court to the court of appeals, and if he doesn't do that collateral estoppel would bar him from relitigating his allegations in a fraud action under the securities laws.

Moreover, if a participant did appeal such a determination, it would seem that the proponents, since they are protected by Rule 8013, could safely allow the appeal to run its course without trying to cut it short by filing a motion to dismiss. Or alternatively they could postpone implementation and ask for expedited consideration of the appeal.

RKR, however, appealed the confirmation order because they believed the proponents had fooled the Bankruptcy Court into deciding an issue of law erroneously. RKR pursued their appeal as far as they could and although Congress had given them a right to appeal to the First Circuit, that court declined, at the proponents request, to decide RKR's appeal on the merits.

The First Circuit now says that considerations of equity and the need for finality justify barring RKR from litigating their allegations anew in a securities action, but it is impossible to understand why any court should think the equities are on the side of the proponents.

The proponents achieved their objectives by fooling the bankruptcy court into approving a false disclosure statement and then exploited the process, as they had planned to do from the beginning, to cut off RKR's appeal and thereby not only avoid the possibility of losing but also the consequences of winning and establishing a rule of law, i.e. that utility investments are not protected by the Constitution, that would be detrimental to their own interests. By their actions they have caused the Bankruptcy Court's mistaken understanding of the law to be applied to the common stockholders of PSNH while NU will be free to claim, at least in Massachusetts and Connecticut and at FERC, that its prudent investments are protected by the Constitution.

This Court recently discussed in U.S.Bancorp Mortgage Company, v. Bonner Mall Partnership, ___ U.S.___, 115 S.Ct. 386 (1994) when it was appropriate to vacate a judgment in a case that had become moot and said that it has always looked to whether the party seeking relief caused the mootness by his voluntary action and that vacatur must be granted where mootness results from the unilateral action of the other party.

Vacatur does not lie here since it was RKR's appeal of the confirmation order that the First Circuit determined was moot, not the reorganization itself, but surely it is not consonant with justice to deny RKR the right to prosecute their action and relitigate their allegations with regard to the powers of the NHPUC, when the mootness of RKR's appeal can not fairly be said to have been caused by RKR's failure but by NU's unilateral action to implement the Plan and file its motion to dismiss, and when the Court knows that no one else, not even NU, will be bound in any way by the determinations made, by either the Bankruptcy Court or the District Court (since its decision has not even been officially reported) with regard to the merit of RKR's allegations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit in this matter.

DATED: March 10, 1995

Respectfully submitted,

Robert C. Richards
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Counsel for Petitioners

APPENDICES

INDEX TO APPENDICES

Appendix Page

A. Opinion of the Court of Appeals 1a

B. Opinion of the District Court of Rhode Island reported in _In re Public Service Company of New Hampshire_, 848 F. Supp. 318 (D.R.I). 27a

C. Opinion of Bankruptcy Court for the District of New Hampshire reported in _In re Public Service Company of New Hampshire_, 148 B.R. 702 (1992) 61a

D. Court of Appeals denial of Petition for Rehearing (issued January 26, 1995) 137a

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 94-1489

IN RE: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Debtor,

EDWARD KAUFMAN, ET AL.,
Defendants, Appellants,
v.
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Ernest C. Torres,[*]
U.S. District Judge]

Before
Selya, Circuit Judge,
Aldrich, Senior Circuit Judge,
and Boudin, Circuit Judge.

Robert C. Richards for appellants.

Wynn E. Arnold, Assistant Attorney General, Civil Bureau, with whom Jeffrey R. Howard, Attorney General, was on brief for appellee State of New Hampshire.

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[*] Of the District of Rhode Island, sitting by designation.

John B. Nolan with whom Stephen M. Greenspan, Lorenzo Mendizabel, Gary M. Becker, Day, Berry & Howard, Howard J. Berman, and Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A. were on the brief for appellees Public Service Company of New Hampshire and The Official Committee of Equity Security Holders.

January 6, 1995

BOUDIN, *Circuit Judge*. On this appeal, the appellants--Edward Kaufman, Robert Richards, and Martin Rochman--challenge an injunctive order issued by the federal bankruptcy court in New Hampshire, and affirmed by the district court. That order enjoined appellants from bringing a securities fraud suit against the Public Service Company of New Hampshire ("Public Service"), its committee of equity security holders, the State of New Hampshire, and others. We affirm.

I. BACKGROUND

The appellants in this case were common stockholders of Public Service, a common stockholders of Public Service, a New Hampshire public utility. In the 1980s, Public Service owned a nuclear power plant under construction in Seabrook, New Hampshire. Due to the Seabrook project, Public Service experienced severe financial problems and filed for Chapter 11 bankruptcy on January 28, 1988. The details of the bankruptcy proceeding are recounted in the opinion of the bankruptcy court in this case, In re Public Service Co., 148 B.R. 702, 703-09 (Bankr. D.N.H. 1992), and we confine ourselves to a brief overview.

In 1989, Public Service, its committee of equity security holders and a committee representing its unsecured creditors filed with the bankruptcy court a comprehensive plan of reorganization. 11 U.S.C.§ 1125. In accordance with that section, the plan was accompanied by a disclosure statement, to be used in soliciting the plan's acceptance by holders of claims and interests, see 11 U.S.C. § 1126, that described the nature and consequences of the plan. Over the appellants' objections, the disclosure statement was approved by the bankruptcy court on January 3, 1990. 11 U.S.C. § 1125(b). Public Service's plan of reorganization was confirmed on April 20, 1990, after six days of hearings largely devoted to the appellants' objection. 11 U.S.C. §§1128-29.

The plan was to be implemented in two stages, each one contingent on approval by regulatory agencies. The first step--reorganization of Public Service with certain distributions to its owners and creditors--was to take effect only if the New Hampshire Public Utilities Commission approved the plan's provisions regarding new utility rates for Public Service. See 11 U.S.C. §1129(a)(6). That approval was forthcoming, a court challenge to the agency approval by appellants failed, Appeal of Richards, 590 A. 2d 586 (N.H.), cert. denied, 112 S. Ct. 225 (1991), and the reorganization occurred on May 16, 1991.[1]

The second stage effected a merger of Public Service with a subsidiary of Northeast Utilities, a Connecticut utility company selected as the winning bidder for Public Service through a competitive bidding process. The merger was conditioned on the approval of the Federal Energy Regulatory Commission. That approval was also secured, despite an unsuccessful attempt at intervention by appellants in the FERC proceeding, and the merger took place on June 5, 1992.

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[1] Appellants also sought unsuccessfully to challenge the confirmation itself in the district court, in this court and in the Supreme Court. See In re Public Service Company of New Hampshire, 963 F. 2d 469 (1st Cir. 1992), cert. denied, 113 S. Ct. 304 (1992).

At various stages in the bankruptcy proceeding, appellants contended that the proponents of the plan had made false and misleading representations in the disclosure statement. After the confirmation but before the reorganization or merger, appellants filed a motion in January 1991 to revoke the order approving confirmation on the ground that it had been procured by fraud. The request was dismissed on the ground that it was time barred under 11 U.S.C. §1144, which permits reopening for fraud only if sought within 180 days of confirmation.

After the plan was confirmed and largely implemented, Richards--who is also the attorney for the appellants--wrote a letter in March 1992 to counsel for various proponents of the plan, revealing that he intended shortly to begin a class action in the district court for the Southern District of New York. Pertinently, the enclosed draft complaint accused private plan proponents and the State of New Hampshire of violations of federal securities laws, 15 U.S.C. §78, and of common law fraud, based on supposed misrepresentations in the bankruptcy-court disclosure statement.

Public Service, its committee of equity security holders, and the State of New Hampshire promptly brought an adversary proceeding in the bankruptcy court to enjoin the appellants from commencing the threatened action. After granting interim relief, that court in November 1992 granted the injunction. Public Serv. Co. v. Richards, 148 B.R. 702 (1992). The injunction barred any future civil action by appellants challenging the bankruptcy court disclosure statement, the confirmation order or the solicitation of acceptance. The district court affirmed the injunction. Kaufman, Richards and Rochman appeal.

Despite the injunction, in late November 1992 Richards, acting as the attorney for yet another Public Service stockholder, did commence the threatened fraud action against several private appellees, but not against the State of New Hampshire, in the Southern District of New York. The bankruptcy court found Richards in contempt but imposed no sanction; the district court for the Southern District of New York thereafter dismissed the complaint without prejudice. Richards has not sought review of the contempt order in this court, and we are therefore concerned only with the injunction.

II. DISCUSSION

On this appeal the appellants do not challenge the authority of the bankruptcy court to enjoin a collateral attack on its orders and proceedings. See generally Local Loan Co. v. Hunt, 292 U.S. 234 (1934). Instead, they attack the injunction on the merits, arguing that neither the safe harbor provision of the Bankruptcy Code nor res judicata principles forestall the subsequent fraud action in the Southern District of New York. These were the principal bases for the injunction issued by the bankruptcy court, although it also held that a suit against New Hampshire was barred by the Eleventh Amendment.

The Bankruptcy Code provides that a chapter 11 reorganization may be voted upon by holders of claims and interests, based on a disclosure statement approved by the court after notice, hearing and a determination that the statement contains adequate information. 11 U.S.C. §§ 1125(b), 1126. The adequacy of the disclosure statement is determined under the

Bankruptcy Code and "is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation . . . ." 11 U.S.C. §1125(d). The safe harbor provision, 11 U.S.C. § 1125(e), then states:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

The Bankruptcy Code provides further that the plan cannot be confirmed by the court unless, inter alia, the plan has been proposed "in good faith and not by an means forbidden by law." 11 U.S.C.

§ 1129(a)(3). If a plan is confirmed after the necessary vote, the confirmation may be revoked only if, within 180 days after confirmation, a party in interest so requests and the court thereafter finds that the confirmation order was "procured by fraud." 11 U.S.C. § 1144. These provisions are the framework for the present dispute.

The heart of the appellants' fraud complaint filed in the Southern District of New York was a two-pronged attack on the disclosure statement used in the reorganization of Public Service. The first prong challenged the disclosure statement's description of the authority of the New Hampshire Public Service Commission to impose unfavorable rates on Public Service if the reorganization failed. This contingency was pertinent to the plan's approval because the treatment of the Seabrook investment was in dispute and the plan embodied a negotiated compromise on utility rates to forestall litigation. See 11 U.S.C. § 1129 (b)(6).

The disclosure statement contained some general statements about the power of a utility commission to refuse to include in the utility's rate base imprudent investment--an issue of central importance in relation to Seabrook-- and to temper any required rate increase (e.g., by using a phase in) to avoid "rate shock" to customers. Appellants' theory in their complaint was that the disclosure painted too pessimistic a picture of the legal rules that would constrain Public Service rate increases if the reorganization were rejected and the rate level had to be litigated in court.

The second prong of the attack on the disclosure statement concerned the merger of Public Service into a subsidiary of Northeast Utilities. The disclosure statement offered ranges of projected value for the common and preferred stockholders of Public Service, assuming (in the alternative) that the second phase merger were or were not to be approved. Not surprisingly, the "with" merger assumption generated slightly higher values. The appellants say that without the merger Public Service might have collapsed, the stockholders would have been _far_ worse off, and therefore the stockholders were not adequately warned of a material threat of financial harm. (The merger, of course, did occur.)

Appellants also say that the small differential between the "with" and "without" merger projections concealed the vast benefit that the merger synergies would provide to the new owner. If the Public Service stockholders had known of these benefits, say appellants, they might well have demanded a greater share and rejected the proposed plan. To show that there was a threat that Public Service would collapse absent the merger, and that great synergies would be achieved from it, appellants point to several statements to this effect by the regulatory agencies that ultimately considered the merger.

Few public utility lawyers would be greatly disturbed by the description of state agency powers given in the disclosure statement; although there is plenty of room for disagreement about nuance, the suggestion of fraud in this respect is very far-fetched. As for the financial projections, the complaint does not even begin to show that they were wrong, let alone fraudulent; at most, it asserts some inconsistency with later agency appraisals. Still, we are not concerned here with a motion to dismiss and will assume arguendo (albeit with a good deal of skepticism) that we are dealing with a serious, although entirely unproven, fraud complaint.

If we were faced with a case of what the bankruptcy judge called "secret fraud," appellants might have an arguable basis for collateral attack. True, section 1125(d) could be read very broadly to make any fraud claim disappear since that section provides that the adequacy of a disclosure statement is "not governed by any otherwise applicable non-bankruptcy law." On the other hand, one may doubt that Congress meant in all circumstances to wipe out every damage remedy against a defrauder who managed to deceive everyone, including the bankruptcy court. The very existence of the safe harbor provision suggests otherwise.

Similarly, the safe harbor provision

presents puzzles of its own. On its face, it immunizes only good faith "solicit[ations]" for approval or rejection and "participat[ion]" in securities transactions; it says nothing explicit about false disclosure statements; even if read more broadly, as is likely justified, it does not protect bad faith conduct. Nor does it say where and how good faith is to be determined; the bankruptcy court did make good faith findings in approving the plan, but (as we explain below) their significance is itself open to dispute.

In our view--and we have little precedent to guide us--this case can be disposed of based on a single, relatively narrow circumstance: the attacks now made on the disclosure statement were in part made in the reorganization proceeding itself; and, to the extent that they were not made there, they could and (if meritorious) should have been made there.[2] It is this circumstance that led the bankruptcy judge to distinguish the possibility of "secret fraud," that is to say, fraud of such a character that it could not reasonably be uncovered until after the confirmation.

There is no secret fraud here. The description of state utility commission powers not only could have been disputed during the approval of the disclosure statement but was n fact challenged by appellants. As for the financial projections, they were open to attack at the same time, and appellants point to nothing in the way of newly discovered evidence that could explain why the criticisms now made could not have been litigated at the time. To refer summarily to a couple of conclusory statements from regulators about the need for, or benefits of, the merger does not remotely justify the delay.

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[2] Yell Forestry Products, Inc. v. First State Bank, 853 F. 2d 582 (8th cir. 1988) may represent the closest authority in point. We agree with appellants that it is distinguishable on its facts but believe that it comports with our own view that the courts have authority to fashion appropriate limitations on collateral attacks while reserving the possibility that in some cases they may be justified.

The bankruptcy judge found, in issuing the injunction, that the appellants "did raise or had the opportunity to raise" in the reorganization all of the issues that they now seek to litigate. 148 B.R. at 718. It is implicit in this finding that the appellants by exercising due diligence could have learned enough to raise their present contentions in opposing confirmation.[3] The appellants do not even attempt to undermine the finding, but blandly assert that they had "no obligation" to discover that they had been "lied to." In this context appellants are mistaken.

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[3] The bankruptcy court made this clear by reserving the possibility of a post-reorganization fraud suit based on "secret fraud," 148 B.R. at 720, which we take to mean fraud that a plan opponent could not reasonably have discov-

Because the alleged inaccuracies could have been, and in part were, litigated in the bankruptcy court, we think that court was entitled to prohibit a new (albeit indirect) attack upon the disclosure statement it had approved. Whether or not such an attack is literally forbidden by either section 1125(d) or section 1125(e) is debatable; but against the background of these provisions, and the policies of chapter 11, we think it evident that allowing such an attack would disrupt Congress' detailed scheme for approval of disclosure statements and reorganizations, and would frustrate the

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ered at the time of the reorganization. Id.

proper administration of the Bankruptcy Code.

If there are substantial errors in a disclosure statement, the opponents in the reorganization have every incentive to raise them while the disclosure statement or proposed plan can still be modified; the statute itself points to the importance of a single, definitive approval process. E.g., 11 U.S.C. §§ 1125-26. Conversely, putting to one side the possibility of secret fraud, the Bankruptcy Code looks not only toward repose for a confirmed plan, 11 U.S.C. §1144, but toward protecting those who have participated in the development of execution of the plan. See 11 U.S.C. §§ 1125(d), (e); H. Rep. No. 595, 95th Cong., 2d Sess. 236 (1978).

In acting to protect its prior proceedings, the bankruptcy court acts in an equitable capacity. Later suits that threaten to undermine a bankruptcy judgment are not merely the concern of the individual litigants; the willingness of future claimants and creditors to compromise in chapter 11 proceedings depends on giving the reorganization court's approval a due measure of finality. And in determining how much finality is due, equitable considerations and policy concerns can properly justify results that are not literally compelled by statutory language.

Absent substantial new evidence of fraud, there is no reason why Congress would have wished, or the courts should permit, participants who actively participated in the reorganization to relitigate in later civil actions previously raised issues about the adequacy of the disclosure statement, or to reserve for such actions claims that feasibly could have been made in the reorganization.

The courts have ample authority to infer restrictions necessary to make Congress' plan work. Cf. Yell Forestry Products, 853 F. 2d at 584. The restriction inferred in this case is both narrow and--as the facts of this case illustrate--amply justified.

Res judicata principles were the subject of discussion by the bankruptcy and district courts and of extensive briefing in this court, so it may be helpful to explain why we have chosen not to pursue this line of reasoning. It is quite true, as appellees assert, that the bankruptcy court did in confirming the plan make explicit findings that the plan was proposed, and its acceptance was solicited, in good faith. See 148 B.R. at 707. The latter finding dovetails with the good faith requirement that triggers safe harbor protection for the private appellees, at might at first glance seem to resolve the case against them.[4]

But the res judicata argument leads into a briar patch of problems. Putting aside the appellants' doubtful claim that the good faith finding in question was not "necessary" to the result, the appellants argue that collateral estoppel should not apply because the mootness prevented them from obtaining review of the confirmation in this court. See In re Public Service Company of New Hampshire, 963 F.2d at 471-75. The appellees respond that mootness was caused by appellants' failure to seek a stay of the reorganization while appealing the confirmation. Appellants say they could not afford the bond.

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[4] The State of New Hampshire is not covered by the safe harbor provision--not being a "person" under chapter 11, 11 U.S.C. § 101(41)--although appellants have never explained why they think that the state is responsible for any mistakes in the disclosure statement.

Even if we resolved these issues in favor of the appellees, which we might well do, there is a further more basic problem in invoking collateral estoppel. If we were dealing with a true case of secret fraud, the same concealment that was the gravamen of the collateral attack would likely have constituted a fraud on the reorganization court itself. This would not vitiate the confirmation order, unless challenged within 180 days, 11 U.S.C. § 1144, but it would raise very serious concerns about giving collateral estoppel effect to any finding of good faith that rested upon the same fraudulent concealment. *See* Restatement (Second), Judgments §§28(5)(c), 70 (limitations on later use of judgment procured by fraud).

We are not saying that the collateral estoppel defense is entirely circular; but *if* appellees had fraudulently concealed critical information from the reorganization court, it is not clear that merely pointing to a prior good faith finding by the same court (made in the same state of ignorance) would resolve the matter. By contrast, the route we follow to affirmance--that appellants could and should have litigated their inaccuracy claims in the reorganization forum--does not depend on any prior good faith findings by the reorganization court but on what we see before us today.

Our determinations also does not depend on the literal language of the safe harbor provision but on the broader policies of chapter 11 and on considerations of equity. The determination therefore applies with equal force to comparable claims against the State of New Hampshire and its officials, even though the state itself is technically not covered by section 1125(e). We have not occasion to consider the Eleventh Amendment defense that the bankruptcy court adopted as an alternative ground for precluding suit against the state.

III. CONCLUSION

The bankruptcy court was forebearing in its decision not to punish the apparent contempt of its injunction. It would be unwise for appellants to take our present decision as an invitation to invent new collateral attacks on the reorganization plan that purport to skirt the injunction. Litigation is a device for settling disputes, not for prolonging them to the point of abuse. Cf. Fed R. Civ. P. 11.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

In re: Public Service Company
of New Hampshire
Debtor

Robert C. Richards;
Edward Kaufman;
Martin Rochman,
Appellants

v.

Public Service Company of
New Hampshire and Official
Committee of Equity Security Holders
Appellees
and

State of New Hampshire
Intervenor-Appellee

====================== Civil No. 93-209-T

In re: Public Service Company
of New Hampshire
Debtor

Robert C. Richards and
John B. Mascioni,
Appellants
v.

Public Service Company of
New Hampshire and Official
Committee of Equity Security Holders
Appellees

MEMORANDUM AND ORDER

Ernest C. Torres, United States District Judge.

These cases are before the Court for consideration of appeals from two orders of the Bankruptcy Court.[1] The first order, dated November 3, 1992, enjoined appellants Richards, Kaufman, and Rochman from suing the appellees for their activities in obtaining approval of a Plan of Reorganization for Public Service Company of New Hampshire ("PSNH"). The second order, dated January 22, 1993, adjudged appellants Richards and Mascioni in contempt for violating the first order by commencing a class action suit against appellees in the United States District

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[1] Both cases emanate from the District of New Hampshire, and the consolidated appeals were referred to this Court when the New Hampshire district judges recused themselves.

Court for the Southern District of New York. For the reasons hereinafter stated, both appeals are denied and the orders of the Bankruptcy Court are affirmed.

FACTS

In January, 1988, Richards,Kaufman and Rochman were shareholders of PSNH. At that time, PSNH was New Hampshire's largest public utility and the principal owner of a nuclear power facility being constructed at Seabrook, New Hampshire. Because the State of New Hampshire did not allow the cost of constructing a nuclear power plant to be included in utility rates until the nuclear plant was brought on line, PSNH was required to borrow heavily in order to proceed with the Seabrook project. When delays were encountered in obtaining regulatory approvals, mounting interest expenses and escalating construction costs caused PSNH to seek protection under Chapter 11 of the Bankruptcy Act.

In late 1989, Northeast Utilities Service Corporation ("NUSCO"), PSNH and others submitted a Plan of Reorganization (the "Plan"). One of the key elements of that Plan was a proposed rate agreement (the "Rate Agreement") between PSNH and the State of New Hampshire. By its terms, the Plan did not become effective unless and until the New Hampshire Public Utilities Commission ("NHPUC") approved the Rate Agreement. The Plan also provided for the eventual merger of PSNH into Northeast Utilities ("Northeast"), and the purchase of PSNH's common stock for $20 per share. That aspect of the Plan was contingent upon approval of the merger by the Federal Energy Regulatory Commission ("FERC").

In accordance with 11 U.S.C. §1125, solicitations for acceptance of the Plan were accompanied by a disclosure statement containing information relating to the Plan. Although Richards and Rochman challenged the adequacy of the disclosure statement, it was approved by the Bankruptcy Court as "contain[ing] adequate information within the meaning of § 1125." The order approving the disclosure statement was never appealed.

On April 20, 1990, after six days of hearings, the Bankruptcy Court confirmed the Plan over the appellants' objection. The Bankruptcy Court specifically found that the Plan had been proposed "in good faith" and that the Rate Agreement provided for a rate increase that was "fair and equitable." The appellants appealed the Confirmation Order to the District Court and filed motions in both the Bankruptcy Court and the District Court for a stay of the order pending resolution of the appeal. Those motions were denied.

Neither denial was appealed, and the appellants took no further action to stay implementation of the plan.

However, in January, 1991, the appellants asked the Bankruptcy Court to revoke the Confirmation Order, claiming that it had been obtained by fraud because the Disclosure Statement misrepresented the true value of the merger. That request was dismissed on the ground that it had not been filed within 180 days after entry of the Confirmation Order as required by 11 U.S.C. § 1144. The order of dismissal was not appealed.

On August 22, 1991, the District Court affirmed the Confirmation Order. In re Public Service Co. of New Hampshire, No. 90-272-D, slip op. (D.H.H. Aug. 21, 1991). Richards, Kaufman and Rochman appealed from the District Court's judgment contending that the Plan was not in the best interests of common stockholders because the proposed Rate Agreement provided a lesser return than would have been obtained from a litigated rate case. The First Circuit dismissed that appeal as moot, noting that the Plan of Reorganization had been implemented on May 17, 1991, and finding that the appellants had failed to diligently seek a stay of the Confirmation Order. In re Public Service Co., 963 F.2d 469 (1st Cir. 1992), cert. denied sub nom. Rochman v. Northeast Utilities Service Co., ___ U.S. ___, 113 S. Ct. 304 (1992).

Shortly thereafter, Richards informed the appellees that he intended to initiate a class action against them in the United States District Court for the Southern District of New York for misrepresentation and securities law violations based on their solicitation of approval of the Plan. Specifically, the draft complaint provided by Richards alleged that the disclosure statement: (1) falsely implied that NHPUC had essentially unlimited discretion to set rates regardless of the impact on PSNH and its stockholders; (2) misrepresented the value that the common stockholders would receive if the merger was not implemented; and (3) misrepresented the value of the merger to the ratepayers of PSNH and to the stockholders and ratepayers of Northeast Utilities.

In response, the appellees filed an adversary complaint in the Bankruptcy Court seeking a declaration that the "safe harbor" provisions of § 1125(e) protected them from liability for the alleged securities laws violations and further seeking an injunction against the threatened suit. The Bankruptcy Court held that the proposed class action suit was barred by § 1125(e) and the doctrine of _res judicata_. _In re Public Service_

Co., 148 Bankr. 702, 720 (Bankr. D.N.H. 1992). More specifically, the Bankruptcy Court noted that it had approved the disclosure statement and had found that, in soliciting acceptance of the Plan, the appellants acted in "good faith" and in accordance with the applicable provisions of the Bankruptcy Code. The Bankruptcy Court also enjoined Richards, Kaufman and Rochman "and their attorneys, agents, heirs, assigns or representatives" from commencing any civil action against the appellees to challenge the adequacy of the disclosure statement, the Confirmation Order or the solicitation of acceptance of the Plan.

Despite that order, Richards, purportedly acting as attorney for John G. Mascioni and all other PSNH common stockholders except Richards, Kaufman and Rochman, commenced the previously threatened class action lawsuit. The appellees then moved to have Richards and Mascioni adjudged in contempt. After an evidentiary hearing, the Bankruptcy Court found that Mascioni had acted with notice of the injunction and at Richards' behest. Accordingly, the Bankruptcy Court entered an order adjudging both of them in civil contempt. No sanctions were imposed, but Richards and Mascioni were ordered to dismiss the class action complaint without prejudice to its refiling if the Bankruptcy Court's injunction is overturned.

Richards, Kaufman and Rochman have appealed from the declaratory judgment and the order enjoining them from suing the appellees. In addition, Richards and Mascioni have appealed from the order adjudging them in contempt. Those appeals have been consolidated and are now before this Court.

STANDARD OF REVIEW

In reviewing a decision of a bankruptcy court, the District Court must accept the bankruptcy judge's findings of fact unless they are clearly erroneous. Fed. Bankr. R. 8013; Fed. R. Civ. P. 52(a); In re Bible Speaks, 869 F. 2d 628, 629 (1st Cir.), cert. denied, 493 U.S. 816 (1989); Briden v. Foley, 776 F. 2d 379, 381 (1st Cir. 1985). A bankruptcy court's conclusions of law, on the other hand, are subject to de novo review. In re G.S.F.Corp., 938 F. 2d 1467, 1474 (1st Cir. 1991); Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F. 2d 82, 88 (2d Cir. 1987).

A finding of fact by a bankruptcy court is said to be "clearly erroneous" only when the reviewing court is left with the definite and firm conviction that a mistake was made. D. Federico Co. v. New Bedford Redevelopment Auth., 723 F.2d 122, 126, (1st Cir. 1983) (quoting

Burgess v. M/V Tamano, 564 F.2d 964, 977 (1st Cir. 1977)); see also In re Roco Corp., 64 Bankr. 499, 500 (D.R.I. 1986) (quoting United States v. United States Gypsum Col, 333 U.S. 364, 395 (1948)).

DISCUSSION

I. The Injunction

A. 11 U.S.C. § 1125(e)

As already noted, the Bankruptcy Court enjoined Richards, Kaufman and Rochman from suing the appellees on the ground that such suit was barred by the "safe harbor" provisions of § 1125(e) of the Bankruptcy Code. That section states:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of [Chapter 11], or that participates, in good faith and in compliance with the applicable provisions of [Chapter 11], in the offer, issuance, sale, or purchase of a security, offered or sold under [a reorganization plan] . . . is not liable, on account of such solicitation or participation, for

> violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

11 U.S.C. § 1125(E).

The appellants argue that § 1125(e) does not bar their class action suit because it shields only those acting in "good faith," whereas the proposed class action complaint alleges that the appellees made intentional misrepresentations in their disclosure statement (i.e., that they did not act in good faith). That argument ignores both the purpose of § 1125(e) and the findings made by the Bankruptcy Court.

Congress' intent in enacting § 1125(e) was "to protect creditors, creditors' committees, counsel for committees, and others involved in the case from potential liability under the securities laws for soliciting acceptances of a plan by use of an approved disclosure statement." H.R. Rep. No. 595, 95th Cong., 1st Sess. 229-231 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6189; Yell Forestry Products, Inc. v. First State Bank, 853 F. 2d 582, 584 (8th Cir. 1988). In this case, the Bankruptcy Court expressly found not only that the disclosure statement was adequate but also that the appellees acted in good faith when they solicited approval of the Plan. General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues, ¶ 47; Confirmation Order at 3. There is nothing in the record even suggesting that those findings are clearly erroneous. Under such circumstances, allowing the proponents of the Plan to be sued for alleged securities laws violations merely because they are alleged to have acted intentionally would be diametrically opposed to the purpose of § 1125 (e).

Moreover, as already noted, the appellants failed to appeal the order approving the disclosure statement. Subjecting a bankruptcy court's findings to subsequent collateral attack in another forum would undermine the efficacy of reorganization plans and "would run counter to the important policy favoring finality in bankruptcy proceedings." See In re Public Service Co., 963 F.2d at 474. Exposing persons determined by the bankruptcy court to have solicited acceptance of plans in good faith and by means of adequate disclosure statements to civil suits alleging misrepresentation would have a palpably chilling effect on the reorganization process. The cost of defending such suits and the magnitude of the potential liability would deter all but the most stouthearted from soliciting acceptance of reorganization plans.

It is true that a finding of good

faith by the bankruptcy court at the time of confirmation may not necessarily bar any subsequent judicial inquiry on the subject. Under Section 1144, an interested party alleging fraud may petition the Bankruptcy Court to revoke confirmation of a plan. That section states:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

11 U.S.C. § 1144.

In this case, the appellants did file a revocation petition but not until after expiration of the 180 day period prescribed by § 1144. In this petition, the appellants acknowledged that they had "recognized for some time that there was an inconsistence between the Disclosure Statement and the evidence presented by NU to the NHPUC." However, they asserted that they did not comprehend the significance of the alleged inconsistency until more than 180 days after the Confirmation Order when the ALJ's decision approving the merger was issued. Thus, the appellants averred that "not until we reviewed the ALJ's Initial Decision on the merger did we recognize that the misrepresentation of the value of the merger, for all the reasons set forth herein, was instrumental in procuring confirmation of the Plan." Request at 17.

As already noted, the Bankruptcy Court dismissed the revocation petition as untimely. The appellants attempt to, now, challenge that determination must fail for two reasons.

First, although the Bankruptcy Court made not finding on the subject, it seems clear that all of the facts constituting the alleged fraud were known to the appellants during the 180 day period. The appellants are unable to point to any "new facts" contained in the ALJ's decision supporting the claim of fraud. The allegation that the appellants did not "recognize" the significance of the alleged misrepresentations until later is insufficient to excuse their tardiness.

Even more important is the fact that the appellants failed to appeal the order dismissing their petition as untimely. Because of that failure, the appellants are bound by the Bankruptcy Court's determination. Kale v. Combined Ins. Co., 924 F.2d 1161, 1164 (1st Cir. 1991) (an order dismissing an action as time barred is considered a final judgment on the merits for res judicata purposes).

B. Res Judicata and Collateral Estoppel

The appellants also argue that § 1125(e) does not bar their class action suit because they are not bound by the Bankruptcy Court's finding that the appellees acted in good faith. That argument is inconsistent with established principles of claim and issue preclusion.

The doctrine of res judicata or claim preclusion bars a party from litigating a claim that such party raised or could have raised " 'in respect to the subject matter of . . . prior litigation-.'" In re Belmont Realty Corp., 11 F.3d 1092, 1097 (1993) (1st Cir. 1993) (quoting Dennis v. R.I. Hospital Trust Nat. Bank. 744 F.2d 893, 898 (1st Cir. 1984)); Decosta v. Viacom Int'l, Inc., 758 F. Supp. 807, 812 9D>R>T> 1991); rev'd on other grounds, 981 F.2d 602 (1st Cir. 1992). Collateral estoppel or issue preclusion "prohibits relitigation of any factual or legal issue that was actually decided in previous litigation between the parties, whether on the same or on a different claim.'" In re Belmont, 11 F.3d 1097 (quoting Dennis 744 F.2d at

898); see DeCosta v. Viacom Int'l Inc., 758 F. supp. at 812. Each is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980); DeCosta v. Viacom Int'l Inc., 758 F.Supp. at 811. In this case, the appellants' argument runs afoul of both doctrines.

Since the prior judgment in this case was rendered by a federal court acting under jurisdiction conferred by federal law, its preclusive effect is governed by federal law standards. Kale v. Combined Insurance Co., 924 F. 2d at 1164. Under federal law, the doctrine of issue preclusion bars a party from relitigating an issue if:

1. the party had a "full and fair opportunity to litigate" the issue in an

earlier action, and

2. the issue was finally decided in that action, and

3. the issue was decided against that party, and

4. determination of the issue was essential to the earlier judgment.

DeCosta v. Viacom Int'l, Inc., 981 F. 2d 602, 605 (1st Cir. 1992).

Claim preclusion, on the other hand, occurs, when:

1. there was a prior suit involving the same parties or their privies; and

2. the cause of action in both suits is the same; and

3. the prior suit resulted in a final judgment on the merits.

Kale v. Combined Insurance Co., 924 F.2d at 1165. Unlike issue preclusion, claim preclusion bars relitigation of claims that could have been asserted in the prior proceeding as well as those that actually were asserted. Id. at 1164.

Principles of claim preclusion and issue preclusion apply to bankruptcy proceedings as well as other kinds of litigation. Katchen v. Landy, 382 U.S. 325, 334 (1966). Furthermore, § 1141(a) of the Bankruptcy Code specifically provides that the terms of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner of the debtor, regardless of whether their claims or interests are impaired or whether they have accepted the plan. 11 U.S.C. § 1141(a).

In this case, all the appellants were stockholders of PSNH and either they or those in privity with them actively participated in the confirmation and revocation proceedings. Furthermore, the claim that the appellants seeks to assert in the class action suit is the same claim they litigated or could have litigated in the bankruptcy proceedings because it grows out of the same transaction or series of connected transactions or the same nucleus of operative facts from which their bankruptcy claim arose, namely, the appellees' conduct in soliciting acceptance of the Plan. _See_, _Kale v. Combined Insurance Co._, 924 F. 2d at 1166 (test for determining identity of claims for purposes of claim preclusion is a transactional test). Indeed, the central issue in each case is the same. It is whether the appellees made misrepresentations in their disclosure statement. That issue was litigated in and decided by the Bankruptcy Court which found that the Disclosure Statement was adequate and that the appellees acted in good faith in soliciting acceptance of the Plan.[2]

Nor can there be any question that the Bankruptcy Court's determination constitutes a final judgment for purposes of both claim preclusion and issue preclusion. It is settled law that an order confirming a plan of reorganization constitutes a judgment. See, Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 480 (6th Cir. 1992). Here, the order confirming the Plan was affirmed on appeal. Therefore, that order is a final judgment for preclusion purposes. In addition, the Bankruptcy Court's dismissal of the petition to revoke the Confirmation Order also operates as a final judgment inasmuch as it never was appealed. Kale v. Combined Ins. Co., 924 F. 2d at 1164 (an order dismissing an action as being time barred is considered a final judgment on the merits for *res judicata* purposes).

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[2] Even the appellants concede that they actually "litigated their allegations with regard to the representations of the powers of the NHPUC before [the Bankruptcy Judge] and he determined that they were accurate." Appellants' Brief, at 32

The appellants argue that because their appeal from the Confirmation Order was dismissed as moot, the Order has not preclusive effect. They rely on the *Restatement (Second) of Judgments*, which states:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.

Restatement (Second) of Judgments § 28.

However, as the Bankruptcy Court observed, appellants' reliance on the

Restatement is "misplaced" because the appellants were not prevented from obtaining review of the Confirmation Order "as a matter of law." See In re Public Service Co. of New Hampshire, 148 Bankr. at 710. Rather, review on the merits was foreclosed, in part, by what the First Circuit characterized as the appellants' unexcused failure to seek a stay before the Plan was implemented. In re Public Service Co., 963 F.2d at 473.

The appellants also rely on Gelpi v. Tugwell, 123 F. 2d 377 (1st Cir. 1941), where the First Circuit stated that a prior judgment has no res judicata effect if appellate review is foreclosed by intervening events that render the judgment moot as long as the appellant is not at fault. Once again, that reliance is misplaced for the same reason. Hers, as already noted, the First Circuit explicitly found that appellants were "at fault" by failing to seek a stay of the Confirmation Order which "allowed performance under the PSNH reorganization plan to proceed to a point well beyond any practicable appellate annulment." In re Public Service Co., 963 F.2d at 473. As the Court stated:

> In sum, whether through oversight or 'procedural ineptitude,' see In re Roberts Farms, 652 F.2d at 795 ("procedural ineptitude" in seeking stay no excuse); . . . appellants failed to "pursue with diligence all available remedies to obtain a stay of execution of the objectionable order, In re Roberts Farms, 652 F. 2d at 798.

Id. at 469.

In short the Bankruptcy Court correctly determined that the appellants' proposed class action suit is barred by §1125(e) and principles of claim and issue preclusion. Consequently, their appeal from the declaratory judgment and the order enjoining them from proceeding with that suit is without merit.

II. The Contempt Order

The injunction issued by the Bankruptcy Court clearly prohibited Richards and his agents from commencing any civil action against the appellees challenging the adequacy of the Disclosure Statement, the Confirmation Order, or the solicitation of acceptance of the Plan. It is undisputed that Richards willfully filed the class action suit and that it alleges fraud and misrepresentation by the appellees in the Disclosure Statement and in their actions soliciting acceptance of the Plan. Thus, Richards' conduct was plainly contumacious.[3] Devine v. Rhode Island, 827 F. Supp. 852, 863 9D.R.I. 1988)) (quoting Palimigiano v.DiPrete, 700 F. Supp. 1180, 1191 (D.R.I. 1988))

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[3] Appellants have withdrawn their challenges to the Bankruptcy Court's subject matter jurisdiction and its exercise of that jurisdiction in the underlying adversary proceeding. See Appellants' Reply Brief at 1.

("To establish civil contempt, a complaint must show by clear and convincing evidence that a specific order of the Court has been violated.").

Mascioni contends that he cannot be punished for contempt because the injunction did not name him and because the Bankruptcy Court erred in finding that he acted in concert with Richards. Alternatively, he argues that he is not barred from collaterally attacking the adequacy of the Disclosure Statement because he was not a party in the bankruptcy proceedings and, therefore, is not bound by the Bankruptcy Court's determinations. This Court finds no merit in either argument.

Under Fed. R. Civ. P. 65(d), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 7065, an injunction is binding upon "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." A nonparty may be held in civil contempt for violating the terms of an injunction if "the nonparty participated in the contumacious act of a party or . . .the nonparty was subject to the injunction because legally identified with a party." G. & C. Merriam Co. v. Webster Dictionary Co., 639 F. 2d 29, 35 (1st Cir. 1980). Knowingly aiding or abetting a party in violating an injunction is sufficient participation to subject a nonparty to sanctions. NBA Properties, Inc. v. Gold, 895 F. 2d 30, 33 (1st Cir. 1990); see Reich v. United States, 239 F. 2d 134 (1st cir. 1956) ("It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with a person who has been enjoined in violating an injunction subjects himself to civil . . .proceedings for contempt. . . .").

In this case, there is ample evidence that Mascioni knew of the injunction. The class action complaint in which Mascioni was the named plaintiff recites the fact that the other appellants had been enjoined from bringing such a suit. Moreover, during his deposition, Mascioni admitted that he had read the injunction and discussed it with Richards. Complaint, S.D.N.Y. action at ¶ 19; Deposition of John Mascioni, at 34.

Despite that knowledge, Mascioni agreed to serve as Richards' alter ego by allowing the suit to be brought in his name. His role as a proxy for Richards is underscored by the understanding that he would not be required "to do anything" or to pay any attorneys' fees to Richards for prosecuting the case. Deposition of

John Mascioni, at 55, 38, 45 and 46. Furthermore, Mascioni concedes that he and Richards "acted in concert in the preparation of the [class action] complaint." Appellants' Brief at 7.

Mascioni's argument that he is not bound by the Bankruptcy Court's determinations fails because it is inapposite with respect to the contempt issue. For contempt purposes, it is immaterial whether a nonparty who aids and abets a party in violating an injunction is, himself, bound by the factual or legal determinations made in the action pursuant to which the injunction is issued. Rather, the pertinent inquiry is whether the nonparty knowingly played a material role in violating it. G. & C. Merriam Co. v. Webster Dictionary Co., 639 F. 2d at 35. As already noted, in Mascioni's case the answer to that question is yes.

CONCLUSION

For all of the foregoing reasons, the appeals from the Bankruptcy Court's Judgment dated November 3, 1992, and from the Bankruptcy Court's Contempt Order dated January 22, 1993, are denied, and the Judgment and Order appealed from are affirmed.

IT IS SO ORDERED.

Ernest C. Torres
Ernest C. Torres
United States District Judge

March 23, 1994

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re	Chapter 11
Public Service Company of New Hampshire, Debtor	Case No. 88-0043
Public Service Company of New Hampshire and the Official Committee of Equity Security Holders, Plaintiffs,	Adv. No. 92-1046

and

The State of New Hampshire
Plaintiff-Intervenor

v.

Robert C. Richards,
Edward Kaufman and
Martin Rochman
Defendants

AMENDED MEMORANDUM OPINION

I. INTRODUCTION

The plaintiffs in this adversary proceeding seek declaratory and injunctive relief pursuant to 11 U.S.C. § 105(a) and 28 U.S.C. §§ 1651, 2201 and 2202 and Rule 7001(7) and (9) of the Federal Rules of Bankruptcy Procedure. The plaintiff, Public Service Company of New Hampshire ("PSNH") is a reorganize debtor under a confirming order entered April 20, 1990. The plaintiff Committee of Equity Security Holders ("Committee") is one of the official committees that took part in the reorganization proceeding. The plaintiff, State of New Hampshire, was granted intervenor status by prior order in this adversary proceeding.

The plaintiffs seek to enjoin the defendants Robert C. Richards, Edward Kaufman and Martin Rochman (collectively "RKR: or the "RKR common stockholders") from filing a complaint in the U.S. District Court for the Southern District of New York, as they have threatened to do, alleging various violations of the Securities and Exchange Act of 1934 and other claims against various parties that participated in the solicitation process which lead to the confirmation of the plan of reorganization.

The defendants have not actually filed suit as yet but on March 6, 1992 by a letter from Robert C. Richards, one of the defendants and an attorney for all, sent a draft copy of the intended class action complaint to the attorneys for the plaintiffs with a short and succinct cover letter reading: "Dear Fellas: Here is a draft of a complaint that I intend to file in a month or so." Notwithstanding the somewhat flippant tone of the aforesaid cover letter the hearings before this Court have established that there is an actual and present dispute between the parties constituting a sufficient case and controversy that would support jurisdiction in a federal court.

In addition to the present plaintiffs in this adversary proceeding, the defendants' class action complaint names as additional representative defendants and classes Northeast Utilities ("NU"), a major Connecticut Utility Company, that was a successful "bidder" in the plan auction procedures that lead to an acquisition and merger plan of reorganization of the debtor with Northeast Utilities, the State of New Hampshire, which was granted intervenor status in the reorganization proceedings, in view of the regulatory context involving the debtor public utility company, the members of the Equity Committee, the financial advisor to the Equity Committee, and the attorneys for Northeast Utilities and the Equity Committee. The plaintiff class in the proposed litigation is asserted as all persons who held common stock of PSNH on January 3, 1990 when this Court approved the disclosure statement with reference to the plan of reorganization that was ultimately confirmed.

The confirmed plan had an effective

date tied to the obtaining of various regulatory approvals, including primarily the requirement under § 1129(a)(6) of the Bankruptcy Code requiring approval of the rates of a reorganized utility under a confirmed plan by the applicable regulatory agency. the New Hampshire Public Utilities Commission did approve the rate agreement embodied in the plan and the plan became effective on May 16, 1991. At this stage the debtor was reorganized pursuant to the plan and the confirmation order. The plan itself provided for a second contingent stage after reorganization to effectuate a merger of the reorganized debtor with Northeast Utilities after the Federal Energy Regulatory Commission ("FERC") and other involved regulatory agencies approved the proposed merger. At that stage NU through a subsidiary would purchase all of the newly issued and outstanding common stock of the reorganized PSNH at $20 per share. The FERC finally approved the merger on January 29, 1992, with various conditions which have been worked out acceptable to NU and the merger was actually implemented on June 5, 1992.

The gravamen of the proposed complaint[1] by the defendants here is to the effect that the solicitations for acceptances of the plan of reorganization by the defendants here during the reorganization by the defendants here during the reorganization proceedings involved false representations which should be actionable for damages under various theories and which are not protected by the "safe harbor" provisions of §1125(e) of the Bankruptcy Code inasmuch as such false representations deny a "good faith" status to the plan proponents essential to the protection of §1125(e) of the Code. The falsities alleged revolve around the following basic contentions: (1) That the disclosure statement misrepresented the powers of the NHPUC in acting upon appropriate rates for PSNH with regard to its Seabrook Nuclear Power Plant costs implying that the NHPUC had essentially unlimited discretion to set rates regardless of the impact on PSNH and its stockholders; (2) That the disclosure statement misrepresented the value that the common stockholders would receive if the merger were not implemented since the disclosure statement implied that the unsecured creditors would receive essentially the same value ($20 per share) even if the merger did not occur; and (3) The disclosure statement misrepresented the value of the merger to the ratepayers of PSNH and the stockholders and ratepayers of NU.

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[1] The proposed complaint is attached as an exhibit to the plaintiff's complaint in the present adversary proceeding.

The plaintiffs in the present adversary proceeding seek a declaration from this Court that its findings in the confirmation order that the plan proponents "complied with the applicable provisions of chapter 11 of the Bankruptcy Code" and that the plan was proposed and solicited in "good faith" absolves any party involved in the solicitation of acceptance of the plan from liability for violation of any otherwise applicable law. Plaintiffs note that the confirmation order has now become final notwithstanding various appeals by the RKR parties. See _In re Public Service Company of New Hampshire_, 963 F. 2d 4690 (1st Cir. 1992), _cert_. _denied_ _sub_ _nom_.,_Rochman v. NE Utilities Service Co._, 1992 U.S.LEXIS 6347, 61 U.S.L.W. 3264 (1992). Plaintiffs also note that RKR appeals in the NHPUC Regulatory proceeding that approved the rate agreement have also failed and that NHPUC approval is now final. See Appeal of Richards, et al, 134 N.H. 148 (1991), cert. denied, 112 S.Ct. 275, 1991 U.S. LEXIS 5326 (1991). Finally, plaintiffs note that the RKR parties had an opportunity to raise their present misrepresentation contentions not only at the disclosure statement stage and plan confirmation stage of the reorganization proceedings but also by a motion to revoke confirming order for fraud pursuant to § 1144 of the Bankruptcy Code.[2]

The present defendants respond that they are not attempting to revoke the confirming order but are simply seeking damages against the named defendants for plan solicitations not undertaken in good faith by those parties and that §1125(e) of the Bankruptcy Code necessarily implies litigation outside the bankruptcy forum may ensue against plan proponents not acting in good faith. They further assert that there is no preclusive effect in that regard by the findings made in the confirming order; and that in any event this Court has no subject matter jurisdiction to consider enjoining their proposed lawsuit.

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[2] The RKR parties did in fact file a motion to revoke the confirming order under § 1144 but that motion was dismissed as untimely inasmuch as it was filed after the mandatory 180 day provision of § 1144 of the Code.(Court Document No._).

With regard to the last point, concerning subject matter jurisdiction, I ruled from the bench at the conclusion of the hearings in this matter that this Court does in fact have jurisdiction to enforce its own orders when that relief is warranted. Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934); In re Franklin, 802 F. 2d 324, 326 (9th Cir. 1986); Lee v. Hunt, 631 F.2d 1171 (5th Cir. 1980), cert. denied, 454 U.S. 834 (1981); In re Paris Indus. Corp., 132 B.R. 504, 508

(D.Me. 1991); In re Johns Manville Corp., 91 B.R.225, 228 (Bankr. S.D.N.Y. 1988); In re White Motor Credit Corp., 75 B.R. 944, 947 (Bankr. N.D.Ohio 1987); In re Coral Air, Inc., 40 B.R. 979, 982 (D.V.I. 1984). That jurisdiction includes the power to declare and determine the scope and effect of orders entered in the bankruptcy proceedings in certain circumstances. The pertinent orders involved were the orders entered during the reorganization of PSNH approving the disclosure statement as containing "adequate information" for those called upon to vote upon the plan pursuant to §1125 of the Bankruptcy Code, and the Order Confirming the Plan of Reorganization under §1129 of the Code which contained determinations, *inter alia*, that the proponent of the plan complied with all applicable provisions of the Bankruptcy Code and that the plan had been proposed in good faith and not by any means forbidden by law. Interrelated is the impact of §1144 of the Code regarding a remedy for fraud and the procurement of a confirming order as it may throw light upon the proper construction of the other statutory provisions. In this context it is my judgment that this adversary proceeding clearly arises under Title 11 and arises in a case under Title 11, United States Code, and therefore comes within the subject matter jurisdiction provided under 28 U.S.C. §1334(b); and moreover constitutes a core proceeding pursuant to 28 U.S.C. §157(b)(2)(L). Local Loan Company v. Hunt, 292 U.S. at 239; In re Paris Industries, 132 B.R. at 508. Whether that jurisdiction should be used here to grant the relief requested is another question.

Accordingly, I adhere to the reasons and ruling that I made from the bench with regard to this matter and hold that this Court does have subject matter jurisdiction and jurisdiction over the parties to determine the questions presented in this adversary proceeding.

The parties have submitted the questions raised in this adversary proceeding for determination by cross motions for summary judgment as to which oral arguments were heard on July 10, 1992. The Court has reviewed the extensive pleadings and documentations submitted by the parties together with its own review of the record of the reorganization proceeding and finds that the matter is appropriate for summary judgment disposition under the applicable standards.[3]

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[3] "Summary judgment is proper where there is no 'genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)." Bank One Texas v. A.J. Warehouse, Inc., et al, 968 F.2d 94 (1st Cir. 1992).

II. KEY FACTS

1. On January 28, 1988, Public Service Company of New Hampshire ("PSNH"), as debtor, commenced a voluntary reorganization case under Chapter 11 of the Bankruptcy Code. (Docket No. 1).[4]

2. The Third Amended Joint Plan of Reorganization ("Plan") (Docket No. 2997) proposed by Northeast Utilities Service Corporation ("NUSCO"), PSNH, the Official Committee of Unsecured Creditors ("Creditors Committee"), the Equity Committee, Citicorp, Consolidated Utilities & Communications, Inc. and Shearson Lehman Hutton Inc. and the Third Amended Disclosure Statement ("Disclosure Statement") (Docket No. 2998) were filed on December 28, 1989. This Plan of Reorganization was the "surviving plan" from a competitive

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[4] Unless otherwise noted, all references to docket numbers are to the PSNH Bankruptcy Case, No. 88-00043.

bidding process between four major regional utilities interested in acquiring PSNH that took place during a series of disclosure statement hearings on multiple plans which occurred from September of 1989 in accordance with specific procedures authorized and directed by the Court for that purpose.

3. On December 20, 1989, defendants Martin Rochman and Robert Richards filed a motion to reopen the hearings with respect to the Disclosure Statement, summarily reject the Plan, create a common stockholder committee and to require PSNH to seek regulatory approval for a rate increase. In addition to seeking an order directing PSNH to file a rate case, Rochman and Richards also requested that the court enjoin the New Hampshire Public Utilities Commission ("NHPUC") from suspending that filing so that it could go into effect without suspension and not

subject to refund. (Docket No. 2969). The motion was denied. (Docket No. 2979 and 2979.1).

4. On December 28, 1989, this court conducted a final hearing on the Disclosure Statement. (Docket No. 3014). By Order dated January 3, 1990 (Docket No. 3003), this court approved the Disclosure Statement, having previously held that the [Proposed] Second Amended Disclosure Statement filed by NUSCO on December 6, 1989 had "contained adequate information within the meaning of §1125 of the Bankruptcy Code."[5] No appeal was taken from the Order approving the Disclosure Statement.

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[5] The Court had previously closed the disclosure statement hearings at the conclusion of an extensive all-day Saturday hearing on December 2,1989, subject to awaiting the action of the Legislature of the State of New Hampshire scheduled to meet in special session in mid-December to consider enactment of the necessary enabling legislation with regard to the rate agreement embodied in the plan. (Transcript, Document No. 2947)

5. On January 10, 1990, Rochman and Richards refiled their earlier motion to reject the Plan summarily (Docket No. 3025). The motion was denied by Order entered February 9, 1990, (Docket No. 3111) and no appeal was taken.

6. On January 16, 1990, Rochman and Richards filed Application of Martin Rochman and Robert C. Richards For An Order Amending The Disclosure Statement For the Northeast Utilities Service Company Plan of Reorganization (Docket No. 3047). The application was denied by Order entered January 17, 1990 and no appeal was taken. (Docket No. 3052).

7. Rochman and Richards also filed an _ex parte_ application dated January 16, 1990 (Docket No. 3046) seeking to restrain temporarily transmission of the Disclosure Statement to stockholders. This court denied the application on January 17, 1990 (Docket No. 3052). No ap-

peal was taken.

8. On February 23, 1990, Messrs. Richards, Kaufman and Rochman ("RKR") filed objections to Confirmation of the Plan. (Docket No. 3173).

9. On March 16, 1990, RKR filed a supplement to their prior objections to Confirmation of the Plan (Docket No. 3372).

10. On April 20, 1990, after six days of hearings, this court confirmed the Plan and found that the Plan was proposed in "good faith and not by any means forbidden by law." Confirmation Order, p. 3, ¶4. (Docket No. 3617). This court considered the objections filed by RKR and rejected them, ruling that "the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case." Confirmation Order,

p.12, ¶28. In connection with the Confirmation Order, this court also issued its General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues (the "General Findings and Conclusions"). (Docket No. 3618). Paragraph 47 of the General Findings and Conclusions provided that the "Proponents have engaged in post-petition disclosure and solicitation in good faith and in compliance with the applicable provisions of Section 1125 [of the Bankruptcy Code]." In addition, this court issued a separate opinion dated May 17, 1990, providing amplified findings and conclusions dealing solely with the RKR objections (the "RKR" Opinion) (Docket No. 3742). In re PSNH, 114 B.R. 820 (Bankr. D.N.H. 1990).

11. On May 21, 1990, following the issuance of the RKR Opinion, RKR appealed the Confirmation Order to the United States District Court for the District of

New Hampshire, and filed a motion for a stay of the Confirmation Order in this court (Docket No. 3794). After a hearing held on June 8, 1990, this court denied that motion by Memorandum Opinion and Order on Motion for Stay Pending Appeal dated June 19, 1990 (Docket No. 3896). In re PSNH, 116 B.R. 347.

12. On May 30, 1991 NUSCO et al filed a motion to dismiss the RKR appeal and the district court refused the motion because NUSCO had failed to certify a good faith attempt to obtain RKR's concurrence under Rule 11 of the Local District Court Rules. On June 10, 1991, RKR's concurrence was denied. NUSCO then certified this to the district court. RKR subsequently filed a Motion for Declaration That Appeal Will Not Be Mooted By Substantial Consummation of Plan of Reorganization, or In The Alternative For a Stay of Confirmation Order Pending Appeal

in the district court. That motion was refused by the Clerk of the district court on July 26, 1990, because of RKR's failure to comply with Rule 11 of the local district court rules. RKR never refiled their motion.

13. On February 6, 1991, RKR again sought a stay of the implementation of the Plan by filing a Motion for a Stay of Confirmation Order Pending Appeal in the district court.

14. On January 17, 1991, RKR filed a Request for Revocation of Confirmation Order with this court (Docket No. 5138) claiming that the Confirmation order had been procured by fraud. RKR contended in their request that various proponents of the Plan had misrepresented in the Disclosure Statement the true value of the merger. By Order dated February 20, 1991, (Docket No. 5330), this court dismissed RKR's request on the ground that

it was time-barred by 11 U.S.C. §1144. RKR never appealed the order.

15. On August 6, 1991, RKR filed a petition for a writ of mandamus from the United States Court of Appeals for the First Circuit ordering Chief Judge Shane Devine to decide the RKR appeal of the Confirmation Order on the merits within sixty days. On August 21, 1991 and August 22, 1991, the District Court issued a Memorandum Opinion and entered Judgment affirming this court's order confirming the Plan. In re Public Serv. Col, No. 90-272-D, slip op. (D.N.H. Aug. 21, 1991). NUSCO et al filed a "suggestion of mootness" with regard to the RKR petition for the writ of mandamus because the August 21, 1991 district court memorandum opinion affirming the Confirmation Order mooted the petition for a writ of mandamus.

16. On September 13, 1991, RKR filed

an appeal of that judgment with the United States Court of Appeals for the First Circuit, claiming that this court erred in concluding that the Rate Agreement was fair and equitable and a reasonable compromise.

17. On February 4, 1992, the First Circuit heard oral argument on the RKR appeal and dismissed the appeal in an extensive opinion entered on May 6, 1992. In re Public Service Company of New Hampshire, 963 F.2d 469 (1st Cir. 1992). On May 18, 1992, RKR petitioned the First Circuit for a rehearing of the order dismissing the RKR appeal. The First Circuit denied the rehearing on May 27, 1992. On June 29, 1992, RKR filed a petition for a writ of certiorari with the United States Supreme Court. Certiorari was denied by order of the Supreme Court entered in October 1992. Rochman v. NE Utilities Service Co., 1992 U.S. LEXIS

6347, 61 U.S.L.W. 3264 (1992).

18. While RKR pursued their appeals of the Confirmation Order, and sought revocation of the Confirmation Order in this court, they also launched, unsuccessfully, collateral attacks on the Plan in other fora. RKR sought to intervene in regulatory proceeding brought by PSNH and NUSCO at the New Hampshire Public Utilities Commission ("NHPUC") and the Federal Energy Regulatory Commission ("FERC"). Each of RKR's applications to intervene in the regulatory proceedings was denied.

19. On May 16, 1990, after their motion to intervene in the NHPUC proceeding was denied, RKR took the unusual step of filing a petition for Writ of Prohibition in the New Hampshire Supreme Court seeking to enjoin proceedings at the NHPUC on the Rate Agreement. (Copy attached as Exhibit 19). That extraordinary

Writ was denied by the New Hampshire Supreme Court on June 18, 1990.

20. On July 20, 1990, the NHPUC issued its order approving the Rate Agreement. RKR then filed an Application for Rehearing of Order Approving Rate Agreement, which was denied by the NHPUC on August 17, 1990. RKR appealed the NHPUC order to the New Hampshire Supreme Court. In their briefs to the New Hampshire Supreme Court, RKR claimed that the Disclosure Statement was misleading with respect to the value of the Plan to common shareholders and argued that the property of PSNH was taken in violation of the United States Constitution.

21. On April 24, 1991, the New Hampshire Supreme Court dismissed RKR's appeal for lack of standing. Appeal of Richards, 134 N.H. 148, 590 a.2D 586 (1991), cert. denied,___ U.S. ___, 112 S. Ct. 275 (1991). The Court also affirmed

the NHPUC's decision that the Rate Agreement was in the "public good" and that the rates were "'just and reasonable.'" Id. at 595-97. In their petition for a writ of certiorari filed with the United States Supreme Court, RKR asserted many of the same claims they had advanced in previous challenges to the Plan, including that the Plan misrepresented the value of the Plan to the common stockholders if there were no merger. The petition was denied.

22. On March 6, 1992, under a cover letter addressed to the attorneys for NUSCO and the equity security holders' committee, RKR advised that they "intended" to file a complaint against the State of New Hampshire, NU, NUSCO, all members of the Official Committee of Equity Security Holders except Rochman, as well as certain attorneys and advisors to those entities.

23. NU, NUSCO and the Equity Committee responded by the present adversary complaint filed on April 1, 1992, seeking declaratory and injunctive relief against the intended lawsuit.

24. On April 6, 1992, the State of New Hampshire, a sovereign state of the United States, moved for and was granted intervention as a party plaintiff.

25. Defendants Richards and Kaufman are citizens of New York while Defendant Rochman is a citizen of Massachusetts

26. On April 6, 1992, this Court conducted a hearing on the plaintiffs' motion for a preliminary injunction preventing RKR from filing the threatened suit.

27. As a result of the April 6, 1992 hearing, the parties entered into a consented to temporary restraining order reserving their respective rights and tolling any statute of limitations that

might bear on the suit until this Court acted on the underlying complaint for a permanent injunction.

28. On April 29, 1992, the plaintiffs filed a motion for summary judgment permanently enjoining RKR from filing the threatened Suit.

29. On May 4, 1992, the State of New Hampshire filed a motion for summary judgment requesting a determination that the Eleventh Amendment to the Constitution of the United States would prevent the defendants from bringing suit against the State of New Hampshire and alternatively that the claims threatened by the defendants had been or could have been litigated previously and had been barred by res judicata.

30. On May 27, 1992, RKR cross-motioned for summary judgment on plaintiffs' complaint and/or dismissal pursuant to Fed. R. Civ. p. 12(b)(1) and (6).

31 On July 10, 1992 the Court conducted a full hearing on the cross-motions for summary judgment and took as the matter under submission the request for declaratory and permanent injunctive relief.

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Code bearing upon decision in this matter are as follows:

11 U.S.C. §1125(b)

> §1125. Post-petition disclosure and solicitation.
>
> (b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

* * *

11 U.S.C. §1125(e)

A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale or purchase of securities.

* * *

11 U.S.C. § 1129(a) (1)-(3)

§1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

11 U.S.C. § 1144

§ 1144. Revocation of an order of confirmation.

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall ---
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor.

IV. PRECLUSION IN GENERAL

RKR argues that neither principles of res judicata nor collateral estoppel provide a valid basis on which to enjoin their threatened suit. RKR's basic contention here is that the dismissal of an appeal of a confirmation order for mootness "erases" the preclusive effect of the confirmation order's findings and ruling. RKR's memorandum of law states the argument as follows:

> With regard to the first allegation, this Court determined that the Rate Agreement was a reasonable compromise because the NHPUC had the power to set rates that the Disclosure Statement represented that it had. But we appealed the Confirmation Order on the grounds that that determination was erroneous. The District Court upheld the Confirmation Order on the merits but the First Circuit dismissed the appeal as moot. As a result this Court's determination with regard to the rules applicable to a rate case has been erased and principles of neither _res judicata_ or _collateral estoppel_ (sic) prevent us from litigating that issue in another action. We simply have not had a full opportunity to litigate the merits of the issue and therefore are not barred by principles of _res judicata_ or _collateral estoppel_ from litigating it fully in another action.

Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's motion for Summary Judgment at 14.

RKR finds support for this proposition from the Restatement (Second) of Judgments. The Restatement states:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.

Restatement (Second) of Judgments §28.

RKR's reliance on the Restatement is misplaced because RKR could have obtained review of the confirmation order and was not barred in doing so by law. The plaintiffs' have noted this fact arguing that RKR failed to timely appeal or otherwise pursue the denial of stay of the confirmation order and such failure allowed the plan to progress to the point of substantial consummation. RKR's response is that to "reverse" the confirmation order would have required a stay "and to get a stay we [RKR] would have had to put up a bond of a few hundred million, if not a billion or more, dollars." Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 16. Whether true or not, this assertion is immaterial in the context of this case. See In re PSNH, 116 B.R. 347 (Bankr. D.N.H. 1990). To rule otherwise would in effect nullify the specific stay procedures, and well established case law regarding mootness on appeals in the absence of a stay of a plan confirmation order, designed to effectuate a strong legislative policy to insure finality with regard to reorganization of plans under the Bankruptcy Code. Bankruptcy Rule 8005; see, e.g., In re Public Service Company of New Hampshire, 963 F. 2d 469 (1st Cir. 1992); In re Roberts Farms, 652 F.2d 793 (9th Cir. 1981); cf. In re Stadium Management Corp., 895 F.2d 845, 848 (1st Cir. 1990) (citing with approval Roberts Farms in holding that where objectors to sale of debtor's assets failed to obtain a stay pending appeal, their objection to completed sale was moot.).

In fact, the Supreme Court decision of United States v. Munsingwear, Inc., 340 U.S. 36 (1950), is controlling on this kind of situation and supports the plaintiffs. Munsingwear began by reciting the doctrine of res judicata:

> [res judicata applies when] a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

Munsingwear, 340 U.S. at 38 (quoting Southern Pacific R. co. v. United States, 168 U.S. 1, 48-49) (emphasis added).

The appellant in Munsingwear also cited the Restatement (First) of Judgments in urging the Court to create an exception where their appeal was dismissed for mootness.[6] Noting that the appellant had failed to file a motion to vacate the judgment in that case and then acquiesced in its dismissal, the Supreme Court wrote "[i]f there is a hardship in this case, it was preventable...the United States having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of res judicata but the need for it in providing terminal points for litigation." Id. at

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[6] "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

Restatement (First of Judgments § 69(2).

41.[7]

The tortured appellate procedure of Miami Center Ltd. Partnership v. Bank of New York, 838 f. 2d 1547, 1557 (11th Cir. 1988), is not unlike the present case. One of the two appeals in Miami Center was of the district court's affirmance of the bankruptcy court's order confirming a creditor's plan of reorganization. The debtors moved for a stay of the confirmation order pending appeal. The bankruptcy court granted a stay on the condition that the debtors post a bond in the amount of $140 million dollars which was subsequently adjusted downward to $50 million dollars. The debtors appealed the bond ruling which the district court dismissed for lack of jurisdiction. Thereafter, the debtors failed to post the bond and the plan proponents went about implementing the plan.

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[7] The "orderly procedure" referred to by the Supreme Court which an appellate may preserve its rights to relitigate a right of action heading for dismissal on mootness grounds is to request a reversal or vacatur of the judgment below and an order remanding the case with an instruction to dismiss it. In this way, the appellant does not find itself in front of the judicial bar of res judicata. Munsingwear, 340 U.S. at 39.

The appeal of the confirmation order was opposed by the plan proponents who moved to dismiss the appeal as moot because no stay had been obtained. After remand and appeal, the eleventh circuit held "that the court [district court] should have dismissed the appeal as moot when the case came back to it after remand." Miami Center, 838 F.2d at 1553.

Significant for purposes of RKR's contention that this court's confirmation order is not entitled to preclusive effect because RKR's appeal was dismissed as moot is the following excerpt of the eleventh circuit's decision:

> Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot,

> as it should have been, the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by this judgment would then have been precluded from reexamination by Judge Hoeveler in his consideration of whether to dismiss the fraud/RICO case. These same consequences will ensue now upon the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot.

Miami Center, 838 F. 2d at 1557.

Although RKR's arguments about the practical impossibility of posting the appeal bond are understandable, the fact remains this obstacle was not a legal impediment but a practical matter. Stopping a $2.3 billion reorganization involving many parties and complex financial arrangements is no exercise in theory but a very substantial undertaking. The central fact is that RKR never obtained a stay of the confirmation order, regardless of whatever happened thereafter. On these facts, I hold that the dismissal of the RKR appeal of the confirmation order on the ground of mootness does not eviscerate the preclusive effect of that order.

V. RELEVANT CONTEXT

The fact that this Court does not accept RKR's contention that the dismissal of their appeal in the Court of appeals removed any preclusive effect of the findings and determinations made by this Court in its confirming order and its accompanying opinions does not by itself mean that the preclusive effect of those findings necessarily would prohibit the threatened law suit.

An essential predicate to determining the preclusive effect that may be given to the findings and determinations made in this case, in the reorganization proceedings, prior to and in the ultimate confirmation determination, as they may apply to the now threatened litigation, requires some understanding of the context in which this unique organization of a regulated public utility company took place. In this context the Court can and odes take judicial notice of the pertinent portions of the record of this chapter 11 case.

As the record establishes, the reorganization was essentially accomplished through an "auction process" in which four substantial regional electric utility companies negotiated and "bid" in ever higher increments and improvements to their respective plans of reorganization during the course of the disclosure statement hearings commencing under orders entered in August of 1989 and concluding with the final approved disclosure statement, with the one successful plan coming out of that bidding process, by an order approving the disclosure statement entered January 3, 1990 as discussed above.[8]

Without belaboring the matter with extensive detail it is apparent from the record in the disclosure statement hearings that essentially all of the questions and topics now posed by the RKR stockholders justifying their threatened litigation were in fact discussed and bruited about endlessly during the course of the hearings that resulted in the ultimate plan and disclosure statement approved by the Court. Accordingly, there is little room to contend that the matters now complained of as being misrepresentations concerned subjects which were not known to the Court or the parties in the plan reorganization process.

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[8] The orders of this Court which established that bidding process to maximize the values obtainable in the reorganization from competitive bidding were entered commencing in March of 1989 and ending with the aforesaid order approving the disclosure statement with regard to the single joint plan that successfully survived that process. The orders involve appear in the record as Court Documents No. 1896, entered March 16, 1989; No. 1899, entered March 16, 1989; No. 2155a, entered May 12, 1989; No. 2386, entered August 14, 1989; No. 2400, entered August 18, 1989; No. 2687, entered October 16, 1989; No. 2836, entered November 7, 1989; No. 2897, entered November 27, 1989; No. 2945, entered December 8, 1989; No. 2979, entered December 22, 1989; No. 3003, entered January 3, 1990; No. 3001, entered January 3, 1990.

Transcripts of the various hearings held to determine the multiple plan procedures and the related hearings that evolved the various disclosure statements and plans are also relevant in this regard to indicate the bidding process that took place. See Court Document No. 2391, August 11, 1989; No. 2428, August 18, 1989; No. 2527, September 22, 1989; No. 2693, October 13, 1989; No. 2798, October 27, 1989; No. 2887, November 13, 1989; No. 2898, November 14, 1989; No. 2961, November 15, 1989; No. 2971, November 16, 1989; No. 29723, November 17, 1989; Nos. 2887, 2888, November 20, 1989; No. 2920, November 30, 1989; No. 2922, December 1, 1989; No. 2947, December 2, 1989; and No. 3014, December 28, 1989.

The question as to the breadth and scope of disclosure which would provide "adequate information" pursuant to §1125 of the Bankruptcy Code was a question of judgment and discretion that this Court exercised in the context of the foregoing development of the proposed plan of reorganization and the various hearings leading to a determination of what would be adequate information for creditors and stockholders called upon to vote upon the plan.

Indeed, when the RKR individuals became active in the case in late December of 1989, and filed their flurry of pleading objecting to the Disclosure Statement and requesting various actions to undo the plan formulation process that had already occurred, this Court and the parties in interest clearly were on notice of their contentions, but nevertheless their requests were denied and those determinations have now become final in terms of what would constitute adequate disclosure with regard to the plan of reorganization that was ultimately confirmed.

The final disclosure statement (Court Document No. 3062) in its index, page iii, gave clear notice to all concerned that the rate agreement was a major factor in the proposed plan by the following detailed listing of specific topics pertaining to that subject:

A. General Rules Applicable to a Seabrook Rate Case

B. Major Issues Presented by Seabrook in Rate Case

  1. Prudence
  2. Used and Useful
  3. Affordability of Rates

C. Conduct of a Rate Case

D. Possible Outcome of a Seabrook Rate Case

  1. Possibility of Full Recovery

  2. Prudence of Seabrook Investment

  3. Used and Useful Nature of Seabrook

  4. Affordable Rate Levels

  5. Recent Seabrook Settlements

  6. Comparative Advantages of Proposed Rate Plans and a Seabrook Rate Case.

The referenced portion of the Disclosure Statement appears on pp. 70-74 of that document.

With particular reference to the uncertainties with regard to the setting of utility rates, in this context, the disclosure statement [Court Document No. 3062, pp. 70-71) noted the following:

> As a regulated utility, PSNH has certain rights and responsibilities. It is obligated to provide safe and reliable service on a non-discriminatory basis to all who request service. It must also conform to regulations with respect to the provision of its services to the public and limit its charges to the rates approved by regulatory agencies, most importantly the NHPUC. On the other hand, PSNH and its investors are entitled under state and federal law to just and reasonable treatment, including a fair opportunity to earn a reasonable return on capital invested to serve the public. Regulatory agencies are not required to follow any specific regulatory approach, but the end result of regulation must be fair to investors as well as consumers. And, while regulatory agencies are afforded a great deal of discretion, policies or practices that are clearly unreasonable and result in significant financial harm to a utility or its investors have been held to violate the due process protections of the United States Constitution.

> Traditional ratemaking and current New Hampshire law would permit the NHPUC to determine whether to allow inclusion in rates of all or part of PSNH's investment in Seabrook, once Seabrook begins "actually provid[ing] service to consumers." N.H. Rev. Stat. Ann. §378:30-a (the anti-CWIP law). PSNH contends that this investment will be approximately $2.9 billion at January 1, 1990, including $1.6 billion in carrying costs.
>
> The fixed rate increases provided in the Rate Plan are lower than the rates which PSNH contends it would be entitled to collect under traditional ratemaking principles, once Seabrook is providing service to consumers and rate changes are authorized by the NHPUC. In effect, implementation of the Plan will result in recovery of $1.4 billion, or approximately 50% of the Seabrook investment.

While the disclosure statement does indicate that the NHPUC would have flexibility in setting rates that representation in context does not take away from the fact that the Disclosure Statement treatment as a whole refers to the unique context of this debtor embroiled in a bankruptcy reorganization proceeding, the New

Hampshire enabling legislation for the rate agreement, and the various other uncertainties involved.

Essentially all of the issues now being raised by the RKR individual stockholders were in fact discussed at least in general terms in this Court's opinion supporting confirmation of the plan of reorganization.

> The credible evidence, however, supports a finding that PSNH could not recover substantially more under a traditional rate case than it would under the Plan because it is unlikely PSNH would recover significantly higher rates under a rate case. Even if PSNH were successful in obtaining higher rates, the impact of such rate hikes would likely lead to a loss of customers and loss of net revenue to PSNH, and ultimately to a lower return than that proposed under the Plan.
>
> * * *
>
> The significant publicity surrounding this bankruptcy has assured that any interested potential bidder was informed about this case. Interested bidders had many opportunities to negotiate with the Committees, the Debtor, and the State under the special procedures adopted by the Court for this unique case.

The unusual problem of "valuation circularity" presented by a chapter 11 reorganization of a regulated monopoly utility company, and the special procedures employed in this reorganization case to deal with that unique problem, have been discussed at some length in prior opinions of this Court. See,e.g., In re PSNH, 88 B.R. 521 Bankr. D.N.H. 1988); In re PSNH, 88 B.R. 546 (Bankr. D.N.H. 1988); In re PSNH, 99 B.R.155 (Bankr. D.N.H. 1989); In re PSNH, 99 B.R. 177 (Bankr. D.N.H. 1989); In re PSNH, 108 B.R. 854 (Bankr. D.N.H. 1989).

* * *

The plan that ultimately succeeded in attracting the support of the Committees was the plan that offered the most value for the Debtor. A Commission of the Federal Energy Regulatory Commission has stated that this auction assured that maximum value was paid for the Debtor. Therefore, the Court finds that the liquidation value of the Debtor is no more than what has been offered for the Debtor in this Proposed Plan.

* * *

The Court itself during the disclosure statement hearings and proceedings insisted this alternative be set out for the consideration of creditors and stockholders before they were called to vote upon the Plan. The objections to the confirmation filed by common stockholders Rochman, Kaufman and Richards ("RKR") generally raise this issue in the sense that they question the appropriateness of the Rate Agreement and compromise embodied in the Plan and argue that more value could be realized for shareholders if the Plan is denied confirmation and either the debtor-in-possession or its successors were authorized to pursue a litigated rate case before the NHPUC. This contention is considered and rejected in the confirming order entered separately this date.

* * *

With regard to the prudent investment recovery point, the objectors see this principle as a fixed star governing what the regulatory agency can do with regard to the recovery of costs associated with the Seabrook nuclear power plant, and argue further that the requirement is of constitutional dimension. The Supreme Court of the United States however has expressly declined to adopt prudent investment recovery as a constitutional standard. Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 619-20 (1989). The caution which all courts have exhibited in avoiding an exclusive focus on prudent investment as a cost recovery standard stems from the desire to avoid an unwarranted incentive for over capacity generation by public utilities. See Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity", 132 U. of Pa. Law

Review 497 (1984).

* * *

New Hampshire itself, in its statutory and regulatory framework, has both the "prudent" and a "used and useful" standard in this regard, undergirded by the ultimate "just and reasonable rates" statutory language provided in NH RSA 378:7. This legal framework for regulatory action is a far cry from the simplistic "prudence only" position put forward by the objectors. It obviously implies a balancing to cover both the initial analysis at the beginning of the plant construction as well as the ultimate effect of the plant coming on line at a particular time and at a particular cost.

* * *

The New Hampshire PUC and the New Hampshire Supreme Court gave ample warnings to PSNH in this regard in various rulings issued during the course of the Seabrook plant financing and construction. See, e.g., Petition of Public Service Co. of New Hampshire, 130 N.H. 265 (N.H. 1988); Appeal of Public Service Co. of New Hampshire, 130 N.H. 748 (N.H. 1988); Re Public Service Co. of New Hampshire, 70 N.H.P.U.C. 866, 904 (1985); Re Public Service Co. of New Hampshire, 68 N.H.P.U.C. 668, 670 (1983); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 223, 231-2 (1982); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 490, 525

(1982); Re Public Service Co. of New Hampshire, 65 N.H.P.U.C. 492, 493 (1980).

* * *

The Supreme Court of the United States has indicated in dicta that a "shift in methodologies" by a state regulatory agency in midstream with regard to the construction of a regulated utility plant might present a question of constitutional due process violation as a "taking" if shown. See Duquesne Light Co. v. Barasch, 109 S. Ct. 609, 619 (1989). ("The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some time while denying them the benefit of good investments at others would raise serious constitutional questions."). In the present case the court inquired as to whether the objectors could show any such shift in ratemaking methodologies on the part of the New Hampshire [sic] which might present a basis for constitutionally-required full recovery of Seabrook costs but in my judgment the objectors were unable to point to any such shift.

* * *

The concepts of "prudency" and "used and useful" according to the record before me, and the applicable case law, are evolving concepts that regulators are using to effectuate an appropriate balance in the sharing of costs associated with excess cost power plants between ratepayers and investors. In other words, it is at least arguable, notwithstanding the best management and control of costs in the actual construction of a plant, that the decision to go forward with the construction and completion of the plant may be deemed imprudent if it will result in a power plant coming on line with electricity too expensive to be used at the high rates necessitated by full recovery of the associated construction costs. Cf. In re Western Massachusetts Electric Co., 80 PUR 4th 479, 542 (Mass. D.P.U. 1986). The same broadened meaning of the "used and useful" concept could also arguably [sic] can be applied to effectuate a sharing of costs of such a plant, as indicated in the New Hampshire decisions cited above. The very concept of excess capacity created by a plant to expensive for customers to use is a phenomenon largely attributable to the experience in recent years of massive cost overruns with regard to nuclear power plants.

The phenomenon was recognized however in other contexts as early as 1949 by the New Hampshire Supreme Court as noted in In re New England Telephone & Telegraph Co. v. State, 95 N.H. 353, 360 (1949), "If as the

> report of the Commission implies, construction undertaken by the [c]ompany is 'wasteful' or its expense is unwarranted by the demand probable at the necessary price for service produced by it, . . . unwarranted investments may be excluded from rate base, and unjustified expenditures from the determination of a reasonable return." (Emphasis added).

See In re PSNH, 114 B.R. 820, 823-25, 839, 841, 842 n.11.

The RKR stockholders appealed the confirmation of the plan as indicated above to the United States District Court. That Court in its decision affirming the confirming order entered August 21, 1991, In re Public Service Co., No. 90-272-D (D.N.H. filed Aug. 21, 1991) dealt with a number of the arguments put forward by the appellants as follows:

> A number of witnesses testified with respect to the "auction" of PSNH. Robert M. Spann, senior consultant for Charles River Associates, lecturer in economics at George Washington University, and a specialist in regulatory economics and finance, testified that if the value of PSNH was greater than that

> offered by NUSCO, some other entity would have made such offer. T. III, 115-23.
>
> * * *
>
> John F. Curley, managing director of the Merchant Banking Department of Morgan Stanley, was retained to advise NUSCO on the possibility of purchasing PSNH. T. III, 196-97. He testified that the Plan of NUSCO offered the highest value available at the conclusion of the well-publicized auction, which had interested four substantial regional utility companies. Id., 227-30.
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> * * *
>
> Appellants misplace reliance on what they perceive to be an "etched-in-stone" rate-making analysis grounded on a rate base which includes only property "used and useful" in the generation of electricity in which the utility's investment was "prudent" at the time made. Appeal of Conservation Law Foundation, 127 N.H. 606, 637-38, 507 A.2d 652, 673-74 (1986). Not only may legislators give specific instructions to their utility commissions, Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989), but the prudent investment rule is not a constitutional standard. Id. at 315.

While the appeal from the confirmation order was pending in the federal courts the RKR individual stockholders appeared in the NHPUC hearings dealing with the approval of the rate agreement provided for under the confirmed plan of reorganization.[9]

While the RKR group was ultimately denied standing with regard to the NHPUC rate proceedings, and its appeal to the New Hampshire Supreme Court was ultimately dismissed, the New Hampshire Supreme Court in dealing with various appeals from the NHPUC approval order discussed in some detail contentions as to New Hampshire ratemaking requirements, and constitutional requirements, similar to those put forward by the RKR group both in the bankruptcy proceedings and the NHPUC proceedings. Particularly relevant portions of that discussion for present purposes appear in the decision reported in Appeal of Robert C. Richards, Edward Kaufman, and Martin Rochman and Appeal of Campaign For Ratepayers Rights and John V. Hilberg, (New Hampshire Public Utilities Commission) 134 N.H. 148, 143, 148, 164 (April 24, 1991), as follows:

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[9] Section 1129(a)(6) of the Bankruptcy Code requires approval of any such rate agreements included in the plan of reorganization of a regulated utility company.

> The PUC approved the rate plan in an order issued on July 20, 1990. See id. at 469-70. The order was accompanied by an extensive written decision, in which the PUC explained its analysis of the average base retail rate increases contained in the rate plan and summarized the evidence supporting its findings. It concluded that "the implementation of the Rate Plan as set forth herein is consistent with the public good. . . and will result in just and reasonable rates that equitably balance the interests of ratepayers and investors."Id. at 460.
>
> The PUC reached its decision after comparing the rate of return to the cost of capital under the rate plan. Id. at 405-08. It also compared the rates under the rate plan with rates forecast for other New England utilities, id. at 411-12, and the rates estimated, insofar as foreseeable, under traditional ratemaking principles, id. at 410-11. The PUC stated that the rates resulting from the use of traditional ratemaking methodology would probably be higher than those provided

for by the rate plan, but that it was not required to calculate the precise level of rates under traditional ratemaking principles "to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate period." Id. at 410. Moreover, it asserted that "[d]e-termination of just and reasonable rates by traditional ratemaking methodology, is precluded by the Rate [Plan's] prescribing the level of retail rates over the seven year fixed rate period." Id. at 408. The PUC nonetheless estimated the rates that would be achieved under traditional ratemaking principles, insofar as foreseeability permitted. See id. at 410. Appeal of Robert C. Richards, Edward Kaufman and Martin Rochman, 134 N.H., 148, 143.

* * *

Based upon the foregoing analysis, we hold that RSA 362-C:3 (Supp. 1990) did not require the PUC to analyze the rate plan in accordance with traditional ratemaking principles. By using the phrase "just and reasonable," the legislature referred to the constitutional "just and reasonable" standard, rather than the "just and reasonable" standard found in traditional ratemaking statutes, applicable to traditional ratemaking procedures, and discussed in Appeal of Conservation Law Foundation.

Hillberg and CRR also appear to argue that the PUC was constitutionally required to apply traditional ratemaking analysis. Again, they cite Appeal of Conservation Law Foundation as authority. In Appeal of Conservation Law Foundation, we noted that "any attempt to judge reasonableness [of rates] apart from [the traditional ratemaking] process would. . . risk. . . unconstitutionality." 127 N.H. at 639, 507 A. 2d at 674. We did not, however, foreclose the possibility that there existed other constitutionally permissible means of determining "just and reasonable" rates, nor should our holding in that case be construed as unconditionally requiring the use of that traditional ratemaking methodology.

A holding that the use of that traditional ratemaking formula is constitutionally required would be contrary to well-established federal constitutional case law. In Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944), the seminal case in this area, the United States Supreme Court held that the Federal Natural Gas Act, 15 U.S.C. § 717 (1988), does not require the use of any particular formula in determining rates. Id. at 602. The Court stated that the methodology used to set rates is irrelevant. See id. Instead, it is the result reached that is important: "[i]f the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry. . . is at an end." Id. Although the Court decided the case under the Federal Natural Gas Act, it noted that "there are no constitutional requirements more exacting than the standards of the Act." Id. at 607.

VI. SPECIFIC PRECLUSION

The doctrine of res judicata precludes parties or their privies from relitigating issues that were or could have been raised in the pertinent court proceeding. Allen v. McCurry, 449 U.S. 90, 94 (1980); Manego v. Orleans Board of Trade, 773 F.2d 1, 5 (1st cir. 1985). Moreover, a judgment dismissing an action as being time-barred is considered for the res judicata purposes to be a final judgment on the merits. Kale v. Combined Insurance Company of America, 924 F.2d 1161, 1164 (1st Cir. 1991). Finally, the Court of Appeals for this Circuit has adopted the "transactional test" for res judicata purposes holding that a final judgment against a party cuts off all rights of that party to remedies against the other party with regard to all or any misrepresented the value of the merger to the ratepayers of PSNH, and the stockholders and ratepayers of NU, again the question of values under the reorganization of plan was in fact a focal point of both the disclosure statement and plan confirmation hearings.[11] The fact that the disclosure did not contain the degree of detail that RKR now argues was appropriate has been determined adversely to them by the Court's findings with regard to the disclosure statement and confirmed plan that are now final.

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[11] The plan of reorganization itself, a copy of which was attached to the disclosure statement, has the rate agreement attached as Exhibit D to the plan, and sets forth in pages D-85 through D-90, a detailed discussion of the "Investment Adder" defined ass "the capitalized synergies, efficiencies or other cost savings or benefits brought by NU to the acquisition of PSNH..." This segment then discusses in some further detail the various calculations and formula pertinent to the Investment Adder to be considered in the further hearings before the NHPUC. Likewise, a definition and discussion of the "acquisition premium" feature of the rate agreement appears in pages D-5, D-6, and D-14 of Exhibit D. For a discussion of the unique nature of these "regulatory assets" and the justification for their employment in this unique situation (a subject also much bruited about in the plan formulation state of the PSNH case) see Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR 4th 385, 414-17, 432-38 (NHPUC July 20, 1990). If the RKR group were not precluded from raising the issue, as noted below, I would be constrained to force them to take a good long look at the "carcass of a dead elephant" (the grossly excess-cost nuclear power plant involved) that I have brought before other liti-

In any event, I do not accept the RKR contentions in this context that the alleged value "misrepresentations" by the plan proponents were not a general topic of discussion during the hearings and could not have been asserted in more detail during the plan disclosure and confirmation proceedings. In my judgment the RKR stockholders were obliged to do the necessary analysis and raise those contentions during the proceedings lead-

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gants on occasion in this and other utility cases stemming from the Seabrook plant. See In re New Hampshire Electric Cooperative, 138 B.R. 668, 676, fn. 3 (Bankr. D.N.H. 1992). It simply does not do to talk about values and rates in this case in theoretical terms that ignore that harsh reality.

ing up to the plan confirmation or be bound by the Court's now final determinations with regard to the disclosure statement and confirmation of the plan.

The fact that they may not have "thought" of that analysis in the specific form now presented until they were prompted to do so by statements made in other proceedings, subsequent to the confirmation, does not in my view justify their failure to raise those contentions in more detail during the course of the reorganization proceedings prior to entry of the confirmation order if they deemed them material.

In short, I find and conclude that the defendants in the present adversary proceeding are precluded from taking a position contrary to the now final determination by this Court that the disclosure statement approved in this case included adequate information for those voting on the plan to consider their choices; the determination that the plan proponents complied with all applicable provisions of the Bankruptcy Code in seeking the confirmation of the plan; and the determination that the plan was proposed in good faith and that the votes of acceptance were solicited in good faith by the plan proponents. I further find and conclude that this preclusive effect extends to not only the specific issues raised by the RKR stockholders during the reorganization proceedings, but also to other related issues that could have been raised in the same context, and that this preclusive effect includes the assertions set forth in the proposed complaint and litigation that is threatened against the plaintiffs.[12]

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[12] The RKR stockholders did of course have a post-confirmation remedy for fraud in the procurement of the confirmation order under § 1144 of the Bankruptcy Code but, as indicated above,

VII. EFFECT OF § 1125(e)

The RKR stockholders argue that, inasmuch as § 1125(e) of the Code (the "safe harbor" provision) insulates plan proponents from lawsuits regarding their solicitation of acceptance of their plan only if they act in that regard "in good faith and in compliance with the applicable provisions" of the Code, the statute necessarily implies that such plan proponents can be sued outside the reorganization court subsequent to confirmation of the plan notwithstanding that confirmation. There is very little case law under § 1125(e), notwithstanding its inclusion in the original Bankruptcy Reform Act of 1978, and there are no case decisions supporting or refuting the contentions made by the RKR stockholders on

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their motion in that regard was denied as untimely under the mandatory 180 day statute of limitations therein involved.

this point.

It is true that the Court in Yell Forestry Products v. First State Bank of Plainview, 853 F.2d 582, 584 (8th Cir. 1988), stated in dicta that a finding of good faith in a confirmation order would not always protect a proponent of a plan from charges of fraud but the actual decision in that case was to grant summary judgment against the party suing the plan proponents in view of the findings by the bankruptcy court with regard to adequate disclosure and the good faith of the plan proponents.

It may be said as a matter of logic and statutory interpretation that if Congress intended that the approval of a disclosure statement and the confirmation of a plan of reorganization with a good faith finding would insulate plan proponents from any subsequent litigation the statute could have simply so provided directly. The necessary implication is that Congress may have intended to leave open some areas for post-confirmation litigation notwithstanding the confirmation of the plan.[13]

On the other hand, it does not seem rational to permit full litigation of alleged inadequacies and misrepresentations in disclosure during the course of extensive disclosure statement hearings, leading to a contested and fully-litigated confirmation hearing resulting in success for the plan proponents with findings of compliance with the Bankruptcy Code and good faith on the part of the plan proponents, and still let the defeated litigants blithely "start all over again" asserting the same basic contentions in post-confirmation litigation against the plan proponents outside the bankruptcy court forum.

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[13] It is curious however that Congress also enacted § 1144 which expressly provides a remedy for fraud discovered post-confirmation, albeit with a rigid 180 day statute of limitations applicable to that remedy.

It may be that these somewhat conflicting statutory provisions can be harmonized by a rule to the effect that a finding of good faith in a plan confirmation order, accompanied by the earlier determination that the disclosure statement contained adequate information, will not be binding upon parties to the reorganization who can allege and establish a true "secret fraud" with regard to a topic that was not addressed, and normally would not be addressed, during the course of the reorganization proceedings. A secret fraud in this sense would involve a fact or topic which was not the subject of discussion and consideration during the reorganization proceedings, and therefore a matter as to which the Court was not called upon to consider as to the breadth and detail of disclosure necessary, but which covered a fact or topic whose very existence was unknown and not within the normal scope of disclosure expectable in the circumstances. For an example of such a fact pattern see In re Michelson, 141 B.R. 715 (Bankr. E.D.Cal. 1992) (confirmation revoked under § 1144). In such circumstances the reorganization court obviously could not make an informed judgment as to the appropriateness of disclosing the "unexpected" fact in question and therefore arguably its adequate disclosure and good faith determination should not be binding for § 1125(e) purposes.

In the present case, however, it is unnecessary for this Court to reach the question posited above as to possible cases in which the disclosure statement and plan confirmation determinations should not be binding upon litigants who took active part in litigation pertinent to those determinations, and did not prevail, but who nevertheless wish to pursue securities fraud litigation thereafter. In the present case the RKR stockholders had full and ample opportunity to assert the contentions now threatened for post-confirmation litigation and accordingly the Court can and does rule that on these facts the plaintiffs are insulated from the threatened litigation by the provisions of § 1125(e) and the preclusive effects of the relevant orders entered in the reorganization proceedings.

With regard to the intervenor State of New Hampshire the Court finds and concludes that in addition to the Eleventh Amendment bar to suit against the State the intervenor is also entitled to the res judicata effect of the determinations made during the course of the reorganization proceedings, although the State as a non-plan proponent is not itself entitled to the "safe harbor" provisions of § 1125(e).

VIII. CONCLUSION

In accordance with the foregoing findings and conclusions the Court concludes that the motions for summary judgment by the plaintiffs and the intervenor should be granted and the motion for summary judgment by the defendant should be denied, in a declaratory judgment consistent with the findings and reasoning set forth in this opinion.

With regard to the granting of injunctive relief to prohibit the threatened litigation, the Court concludes that injunctive relief is warranted on the facts of this case to effectuate the policies of finality underlying reorganization proceedings under chapter 11 of the Bankruptcy Code. The particular determinations made by this Court after extensive litigation with regard to the disclosure statement and the plan confirmation should not be permitted to be reopened for yet another round of assertion of the same essential complaints against the plan proponents. To permit post-confirmation further litigation against the plan proponents on these facts in my judgment would have a chilling effect upon participation by attorneys, financial advisors, and committee members essential to successful reorganization proceedings under chapter 11 of the Bankruptcy Code. On that ground, I conclude that not only declaratory relief but injunctive relief as requested should be granted.

The plaintiffs shall submit a form of judgment in accordance with this opinion within ten days of date. No appeal time shall run until said final judgment is entered.

Dated at Manchester, New Hampshire

this 19th day of October, 1992.

J.E. Yacos
JAMES E. YACOS
BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1489

EDWARD KAUFMAN, ET AL.,
Defendants, Appellants,

v.

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, ET AL.,

ORDER OF THE COURT

Torruella, _Chief Judge_,
Selya, _Circuit Judge_,
Cyr, _Circuit Judge_,
Boudin, _Circuit Judge_,
Aldrich, _Senior Circuit Judge_.*

Entered: January 26, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

FRANCIS P. SCIGLIANO, Clerk

[cc:Richards, Arnold and Nolan]

*Judge Norman H. Stahl recused himself